MISSISSIPPI LAW JOURNAL

HOUSING LAW SYMPOSIUM

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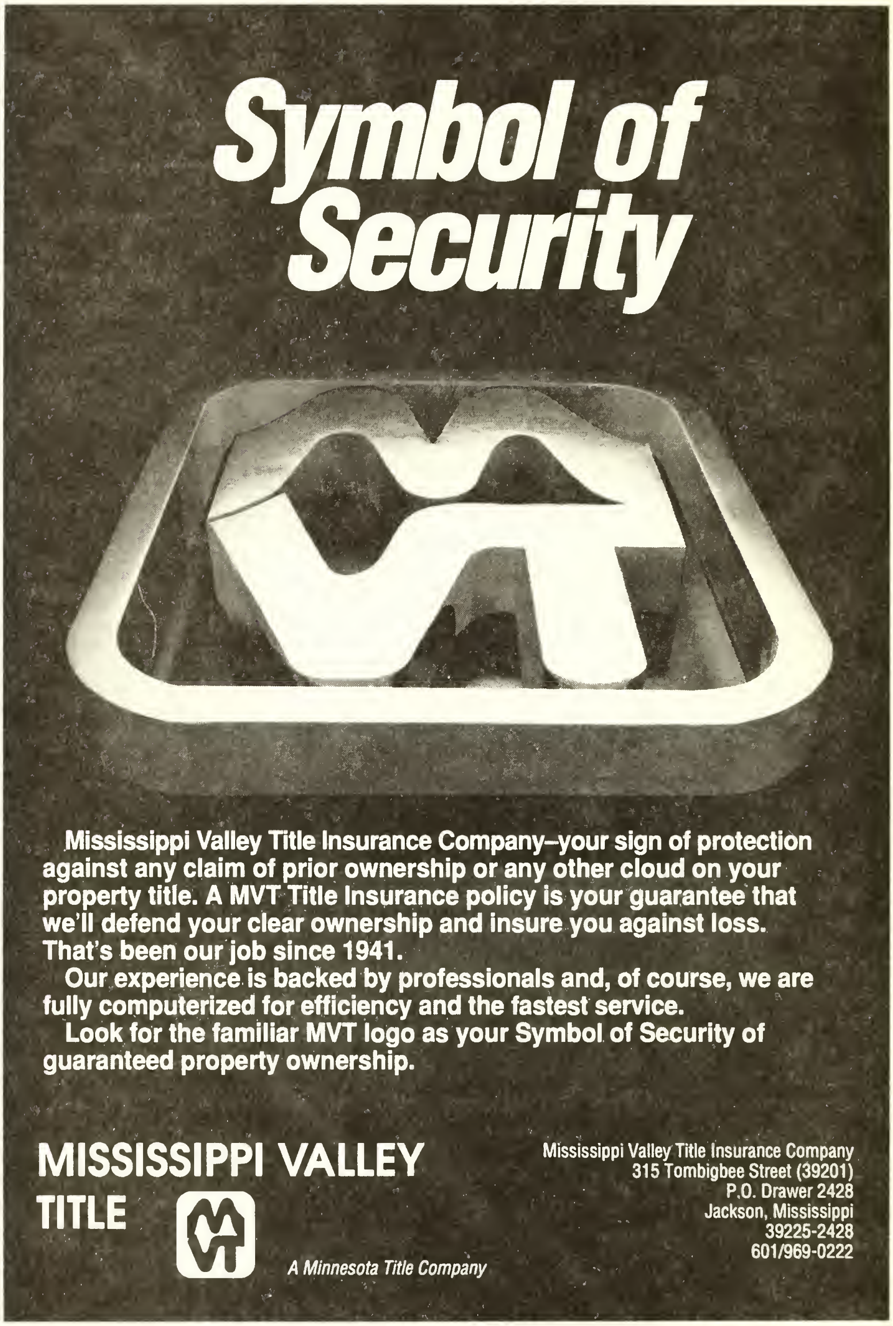

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The *Mississippi Law Journal* (USPS No. 354-300) is published three times annually in Spring, Fall, and Winter, Editorial and business offices: *Mississippi Law Journal*, Law Center, University Circle, Room 111, University, Mississippi 38677-0849.

Current subscription: $35.00 per year. Single issue: $12.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination. For information about subscriptions, please call (601)232-7361, Extension 111.

POSTMASTER: Send address changes directly to *Mississippi Law Journal*, Law Center, University Circle, Room 111, P.O. Box 849, University, Mississippi 38677-0849. Include name, new address (including zip code), and old address. Please notify 45 days in advance to ensure prompt delivery.

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Second class postage paid at University, Mississippi 38677-0849 and additional mailing offices.

Citations conform to A Uniform System of Citation (15th ed. 1991).

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews.

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(Required by 39 U.S.C. 3685)

1A. Title of Publication: Mississippi Law Journal

1B. PUBLICATION NO.: 1 5 4 - 3 0 0

2. Date of Filing: 6/30/92

3. Frequency of Issue: 3 issues per year

3A. No. of Issues Published Annually: 3

3B. Annual Subscription Price: $35.00

4. Complete Mailing Address of Known Office of Publication *(Street, City, County, State and ZIP+4 Code) (Not printers)*

P.O. Box 849
University, MS 38677

5. Complete Mailing Address of the Headquarters of General Business Offices of the Publisher *(Not printer)*

Law School Building, P.O. Box 849
University, MS 39677-9706

6. Full Names and Complete Mailing Address of Publisher, Editor, and Managing Editor ***(This item MUST NOT be blank)***

Publisher *(Name and Complete Mailing Address)*

Mississippi Law Journal P.O. Box 849 University, MS 38677

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8. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages or Other Securities *(If there are none, so state)*

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(1) ☒ Has Not Changed During Preceding 12 Months
(2) ☐ Has Changed During Preceding 12 Months
(If changed, publisher must submit explanation of change with this statement.)

10. Extent and Nature of Circulation *(See instructions on reverse side)*	Average No. Copies Each Issue During Preceding 12 Months	Actual No. Copies of Single Issue Published Nearest to Filing Date
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B. Paid and/or Requested Circulation 1. Sales through dealers and carriers, street vendors and counter sales	302	302
2. Mail Subscription *(Paid and/or requested)*	600	600
C. Total Paid and/or Requested Circulation *(Sum of 10B1 and 10B2)*	902	902
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2. Return from News Agents		
G. TOTAL *(Sum of E, F1 and 2—should equal net press run shown in A)*	1100	1100

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Mississippi Law Journal

Published by Students at the
University of Mississippi School
of Law

VOLUME 61 **WINTER 1991** **NUMBER 3**

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MISSISSIPPI LAW JOURNAL SYMPOSIUM ON HOUSING

The Symposium this year presents a collection of articles dealing with housing issues in Mississippi and the nation. The idea for a series of articles related to housing sprang from a conference held at the University of Mississippi in the Fall of 1991. Professor Deborah Bell of the University of Mississippi School of Law conceived this conference as a means of introducing many well known academicians to workers on the front line of housing issues. The conference inspired an active dialogue between the theoretical and practical applications of housing ideas and policy. Mississippi and the rural South have traditionally lagged behind the rest of the country in housing programs. Thus, housing conditions in Mississippi provided an excellent backdrop for the conference.

Much of the national discussion focuses on urban issues and not rural or small town problems. A number of issues play out differently in the diverse settings: landlord/tenant; housing discrimination; and barriers to development. The conference was specifically designed to explore those differences. This conference brought the unique problems of the rural South to the attention of some very influential members of the housing community. We hope these differences will be considered in the development of future housing programs and policies for the nation.

The conference was also designed to foster a network of concerned housing activists. The conference attracted participants from several southern states who have worked for years to improve the housing in their communities. Ideally, a sharing of information and ideas will help others to avoid setbacks and less productive programs leading to more efficient utilization of available resources. The knowledge that other people are also attempting to use similar programs to improve housing should foster a support network for concerned people.

In addition, the conference served to help initiate a housing clinic developed by Professor Bell. The housing clinic provides legal services to area residents with housing related problems by using second and third year law students to represent clients. The clinic serves many functions including educating future lawyers about housing issues in a real world setting, allowing law students to gain practical experience, and educating members of the community about their legal rights.

This symposium is not designed to provide a detailed description of the housing problems facing Mississippi nor is the intention to set out some grand plan by which these problems can be eliminated. Rather, our goal is to provide an overview of some current issues and programs now being used. Mississippi has a severe housing problem. While we are not faced with large numbers of urban homeless a high percentage of Mississippians are inadequately housed—they are simply further from open view.

The citizens of Mississippi and the state government must act to correct some of these problems of crowding and inadequate housing. The role of decent housing in society is difficult to pin down, which unfortunately makes it easy to overlook at times. However, the role of housing in other societal problems should not be neglected. Many of our society's problems including education, dropouts, drugs and crime are related to inadequate housing. Young children cannot become well educated, productive members of a democratic society when they grow up in ramshackle shanties with no heat or plumbing. Society will incur far less costs in the long run by addressing those problems now. Of course, the current financial situation of both the state and federal government makes substantial government action unlikely.

Another goal of this symposium is to educate lawyers in Mississippi about housing problems. Members of the Mississippi Young Lawyers, through their Committee on Homelessness and Housing, are currently developing programs to encourage the legal community to become involved in this area. The members of the Mississippi Bar represent an enormous base of influence, talent, and intellectual ability in Mississippi. Lawyers in Mississippi represent a group of individuals who are well equipped to tackle housing issues. Groups such as Habitat for Humanity, Mississippi Action for Community Education (MACE) and V'burg, Inc. to name a few, are actively moving forward with community-based housing programs and would enthusiastically embrace support from members of the legal community.

Mississippi has one of the highest percentages of lawyers in the nation doing pro bono work. Some of this energy should be directed in the housing area. Many different types of services are needed. These range from traditional financial support and litigation to business and transactional work for community groups as well as real as real estate and tax. We hope this issue will provide some insight into the problems and will inspire some effort to find solutions.

Robert Hutchison
Symposium Editor

ADDRESSING THE SOUTHERN HOUSING PROBLEM: A SYMPOSIUM

*Talbot S. D'Alemberte**
*Patricia M. Hanrahan***

I am pleased to be included in this edition of the *Mississippi Law Journal* devoted to the desperate housing situation of the state's poor, and even more delighted that the University of Mississippi School of Law is directing its attention and talents to the problems of housing and rural poverty. This is an area of legal assistance often overlooked and underestimated when we consider the plight of impoverished people in our country.

It is particularly important that students at a southern institution be involved in such an effort in a clinical setting, where they can experience first hand the terrible situation in which many are compelled to live. Familiarity with the sight of the shacks and shanties we have grown up seeing in the fields and towns of the South can inure us, who are not poor, to the pain experienced by their residents. The opportunity to understand the causes of these housing conditions and learn what it takes to remedy them will be as empowering for the advocate as for the client. It is also essential that law students, early on in their professional training, be exposed to the immense satisfaction derived from pro bono work, whose impact can be massive and reverberate throughout a family. Introduction to the legal needs of the low-income community will not only provide a needed service to its members, but instill in the Law School's graduates a sensitivity to the concerns of the underrepresented as well as to those of the traditional client.

Poverty in our nation's small towns and rural areas is not often considered with the urgency assigned its urban counterpart. In the past decade, as the crisis in housing affordability has grown so has a heightened concern for its victims - the homeless. Imprinted on the nation's imagination is an image of the urban nomad forced to roam the streets of a large city and scavenge food from garbage cans, or of a mother and children seeking protection from their poverty in emergency shelters and welfare hotels.

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** Patricia M. Hanrahan is the director of the American Bar Association Commission on Homelessness and Poverty and a member of the Mississippi Bar Association.

Homelessness is almost never cast in a rural situation, however, and we are rarely asked to consider people housed in extremely inadequate quarters as homeless, deserving of our compassion and assistance. Yet many residents of rural American Coalition for the Homeless reports that while there is only one county in the entire Northeast and Mid-Atlantic section of the nation where more than twenty percent of the population lives in poverty, Central Appalachia and the South have hundreds such as counties, and almost every one encompasses a rural area. In 1987, in the worst neighborhood in New York City, 11.6 percent of the housing was dilapidated; forty-nine percent of the rental housing in some rural counties in the South fits that definition.[1] Individuals and families in rural areas have been forced to live in houses without running water, without plumbing, or where half the houses without running water, without plumbing, or where half the house has fallen because it is so run down. Homeless people in rural areas have sought shelter in caves and in chicken coops, in cars, in trucks and in abandoned campers.

Because rural people tend to live in physical isolation from one another and from urban centers, this kind of homelessness all too frequently remains hidden. It is laudable when an institution with the influence throughout the state that the University of Mississippi enjoys establishes a law program to highlight and attend to this critical problem. Moreover, it is crucial that the Law School is addressing low-income people's housing needs now, when poverty rates in rural areas are higher than they have been for decades.[2]

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[1] Rural Homelessness in America: Appalachia and the South, National Coalition for the Homeless, Washington, D.C. (1987) 7-8.

[2] E. Lazere, *The Other Housing Crisis: Sheltering the Poor in Rural America,*

In fact, poverty and housing problems in rural locales are generally more severe than those in metropolitan areas. Further, they occur with even greater frequency in the South than in any other region. More than half of all poor households outside metropolitan areas in 1985 lived in the South, and more than three-quarters of all rural households living in substandard housing were located there.[3] Historically, the Afro-American community is poorer than the white and it is not surprising to learn that inadequate housing is more prevalent in the southern rural Afro-American community, where forty-one percent of all households live in substandard housing.[4]

In spite of this, poor rural householders, black and white, receive very little in the way of governmental housing assistance. For example, although low-income householders located outside of metropolitan areas are more likely to own their own homes than urban residents, they generally do not enjoy the significant tax benefits that accompanying this situation - their incomes are far too low to lift them from tax brackets where deductions have little or no effect on finances.[5] Renters fare no better. Only twenty-nine percent of poor rural households which rent their lodging received any kind of federal, state or local rent subsidy, or lived in public housing.[6]

Indigence and inadequate housing have ramifications far beyond the physical structure in which a family lives. People who grow up in poor housing generally raise their children in equally deprived conditions. Teenagers from poor families are four times more likely than nonpoor adolescents to have below-average basic sills, and three times more likely to drop out of high school.[7] Lacking an education, these children will probably remain poor, passing on their legacy to the next generation. Thus, the efforts of law students in the area of low-income housing can also have

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Center on Budget and Policy Priorities and Housing Assistance Council, Washington, D.C. (1988) 34 n.33.

[3] *Id.* at xx.

[4] *Id.* at xxi.

[5] *Id.* at 38.

[6] *Id.* at xvii.

[7] *S.O.S. America! A Children's Defense Budget*, Children's Defense Fund, Washington, D.C. (1990) 10.

a broad social impact.

Unlike their urban neighbors, poorly-housed rural people are more likely to be employed, with families having both parents present in the home.[8] However, even full-time work, does not insure that a family will be able to meet its housing needs. Low-income housing units are more scarce than they have been in twenty years,[9] with shortages felt even in communities where there is a housing glut and experienced more keenly in rural communities.[10] Deficiencies in housing in urban neighborhoods are generally caused by failures in maintenance and upkeep. In rural locales, however, the problems are more insidious structural flaws such as inadequate plumbing, unsanitary waste disposal, broken heating equipment, and leaking roofs.[11]

Residents of rural and small town communities sustain these situations because they have little choice. There are fewer public and private housing and other assistance programs available to them, as well as limited financial and employment opportunities. Nationwide, minimum wages are inadequate to meet the basic living needs of individuals or families; wages for rural workers are even lower. Federal entitlement programs, most notably Aid to Families with Dependent Children (AFDC) fall short of helping families meet basic needs. In Mississippi, AFDC grants for a family of three are less than a third of the U.S. Department of Housing and Urban Development determined Fair Market Rent for a modest two-bedroom apartment in the state, and they have fallen forty percent in buying power in the last twenty years. It is no wonder that well over a third of poor rural households devote at least fifty percent of their meager budgets to housing costs.[12]

How can lawyers and law students help their clients resolve these seemingly overwhelming dilemmas? The scarcity of decent affordable housing is at the core of the homeless crisis our nation is experiencing. We are all aware that housing costs are higher now than ever before, but the burden of paying for shelter falls more heavily on the poorest in our communities. Volunteer legal assistance in the creation of low-income housing can considerably lessen expenses for developers, expenses which are passed on to tenants and purchasers. Attorneys can work with community groups to develop innovative housing structures which remain permanently affordable to the most needy. Lawyers can negotiate with lending institutions on behalf of clients who might not have the skills and standing to obtain financing for housing. Advocates can protect residents of poor housing from unscrupulous landlords and from unjust evictions. Such services are generally not available to low-income clients through volunteer legal programs. Realization of this predicament sparked the creation of pro bono programs devoted to the development of low-income housing in law schools and bar associations around the country.

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[8] C. Arnold, *Ignoring the Rural Underclass: The Biases of Federal Housing Policy*, 192 STAN L. & POL'Y REV. (Spring 1990).

[9] E. Lazere, *A Place to Call Home: The Low Income Housing Crisis Continues*, Center on Budget and Policy Priorities and the Low Income Housing Information Service, Washington , D.C. (1992) 1.

[10] *Id.* at 25.

[11] *Id.* at 25.

[12] *A Vision for America's Future*, Children's Defense Fund, Washington, D.C. (1989) 16-26.

Starting in 1986, a joint program of the Boston and Massachusetts Bar Associations matched transactional lawyers in the state with community development corporations working to create and preserve permanent housing for low-income people. In its first year, the Lawyers Clearinghouse for Affordable Housing assisted in the development of over 2,200 units of low-income housing. At about the same time, Yale Law School started a multi-disciplinary clinical program blending the talents of students in the schools of law, management, public health and architecture to develop hosing for homeless people and those at risk. Students and faculty supervisors are not involved in the purchase, creation and management of low income housing in New Haven, and have written a handbook to guide the efforts to other students and attorneys.

The American Bar Association, through its Commission on Homelessness and Poverty, has urged and assisted other bar associations and law schools to begin programs based on these models. Similar ones now exist in cities and states across the country. The University of Mississippi Law School clinical program is unique, however, in that it addresses primarily small town and rural community housing problems, and will be a real resource in that regard.

A component of the Commission on Homelessness and Poverty's assistance to law schools and bar association homeless programs is the provision of training materials on the subject of low-income housing development. The Commission has produced an array of video and written material for use by legal programs devoted to the creation and preservation of housing affordable by the poor. The ABA itself has also taken steps to enhance the work of pro bono attorneys in these programs. Last year, for example, it adopted policy supporting the community reinvestment activities of financial institutions and committing its funds to banks with outstanding and satisfactory programs. It also urged state and local bar associations and their members to take similar steps. The Association has 370,000 members. Their united effort to support banking activities dedicated to nurturing housing and small business in low-income and minority neighborhoods will provide significant support for the work of pro bono attorneys, law students and community groups developing housing for needy residents.

One of my predecessors, ABA President Robert MacCrate, once noted that as a profession, lawyers have been given by society an exclusive license to practice law and to see to its just administration. It is our responsibility to marshall legal resources and to see that they are deployed to address the social distress of poverty and homelessness. Over the years our profession has acknowledged that it is a public calling, with special responsibilities to the community. We who are charged with the exclusive right to see to the administration and application of the law are responsible, individually and as a profession, and it is up to all of us to see that the vision of a just society is more than words. Where the law has or can devise solutions, the absence of lawyers willing to lend a hand must not be a problem. It is a source of pride, then, when a law school creates a program whose mandate is to teach students to meet this professional and ethical obligation.

THE UNIVERSITY OF MISSISSIPPI HOUSING LAW CLINIC: A LOCAL LAW OFFICE AND REGIONAL LAW CENTER

Deborah H. Bell

After years of teaching a course in housing law at the University of Mississippi, it occurred to me, somewhat belatedly, that students might learn a lot more housing law, develop some valuable lawyering skills, and generally have a much better time representing clients in housing cases than listening to me lecture. A significant number of students at Ole Miss are eager to do pro bono work, and even more are looking for a chance to gain practical experience during law school. In January of this year, we opened the clinic with an initial class of fourteen second and third year students. The classroom component of the course includes substantive training in housing law and skills training in interviewing, counseling, case development and management, negotiation and settlement, as well as refresher sessions on trial skills. Our aim was to create a course that would teach lawyering skills that would benefit most practices. Although law schools have traditionally offered excellent courses in trial and appellate skills, we rarely teach the more mundane skills that actually make up the greater portion of any law practice.

The clinical component of the course has a dual function. The clinic will act as a local law office representing low-income persons in the immediate area in housing cases. In addition, the clinic will serve as a regional law center for the study of housing issues in the southern states. It is an attempt to develop a clinical model that will not only be of educational benefit, but that will be of the greatest assistance possible in the effort to improve housing conditions in the state.

The first aspect of the clinic is an obvious choice. Low-income persons across the state desperately need legal assistance in a wide range of cases including housing. Legal services, the primary organization serving the low-income community, has only twenty lawyers in the entire north half of the state. Since the Mississippi Landlord and Tenant Act just took effect in July of 1991, tenant representation seemed an ideal initial focus for the clinic. In addition to representing clients in individual landlord tenant cases, the students will prepare a manual explaining the new act and will conduct a series of landlord tenant workshops across the north half of the state. The clinic will gradually add other types of housing cases.

The second aspect of the clinic is a departure from the traditional theme of law school clinics. As a regional center, the clinic will prepare demographic data and case studies on housing conditions in the south, study and make recommendations concerning funding sources for housing and law reform measures, serve as a resource for state agencies and housing organizations, and act as a convener of housing advocates and groups in the southern states. This aspect of the clinic was conceived as a response to the conditions described below: the severity of housing conditions in the south; the fact that housing issues in rural southern states differ significantly from urban housing issues, which tend to be the focus of national housing efforts; and that there is a dearth of housing organizations and legal resources for housing in the area. Because these issues are common to Mississippi and its neighbor states, it made sense to develop a regional rather than a state law center, to alleviate duplication of effort across state lines.

In many ways, the housing problems of Mississippians in 1992 are similar to those that have gained national attention in the last ten years. As illustrated by the article at page 509, the pages of the National Housing Task Force Report of 1987 and the Mississippi Housing Task Force Report contain much of the same litany of problems. Across the nation, rents are often out of reach for low and moderate income tenants, particularly in urban areas. The number of tenants who pay over thirty percent of their income for rent, the standard for a "rent-poor" household, has increased. The American dream of security through homeownership is rapidly vanishing. Most renters would be unable to purchase a median priced home today. In Mississippi, only a third of the state's renters could purchase even a $40,000 home. Many persons, particularly the elderly, who do own their own homes are without sufficient income to maintain them. Homelessness, the most visible symptom of the nation's housing crisis, is growing in Mississippi as in the rest of the country. And special needs populations such as the elderly, the handicapped, and AIDS patients require housing specially tailored to their needs. Both in Mississippi and the nation, races remain divided in housing, with racial segregation persisting even after two decades of fair housing enforcement. Like the rest of the nation, Mississippi has faced massive federal cutbacks in housing funding that have severely impacted the state's ability to address housing needs. Nationally, housing programs absorbed the greatest cuts of any social program in the eighties. A great deal of attention nationally has been focused on housing in recent years, particularly on the needs of the urban homeless, the spiraling costs of housing, and the decrease in federal interest in housing law. To the extent that Mississippi and other southern states share national housing problems, they are benefitted by these efforts

While we share many of the housing problems that plague the nation, the housing problems of states in the rural south differ significantly from the rest of the nation. The extent, nature, and demographics of poverty and poor housing in the rural south, the limited financial, legal, and human resources available for housing, and the inappropriateness of traditional programmatic and legal solutions for much of the area's housing call for creative solutions specifically tailored to the region.

Poverty and poor housing are much more prevalent in the southern states than nationally, requiring deeper subsidies and a higher level of funding. Ironically, those states most in need of housing funds often benefit the least from them. Many federal programs require matching funds that poor states cannot provide. Inexperience of local governments, community groups and eligible individuals in securing funds is an additional factor limiting funding sources in the state. State funds as well as federal funds are in shorter supply than in other areas. In response to the cutbacks in federal housing dollars, a number of states have established housing programs at the state level, appropriating general funds for housing, and establishing state development programs. In states, like Mississippi, general funding for housing is not likely to occur, given the already strained financial condition of the state.

Most of the poor, and poorly housed, in the southern states are in rural areas and small towns rather than in cities. Many federal programs are not designed to deal with rural barriers to development such as lack of infrastructure and local lending. In many rural areas, the lack of adequate water and sewage systems is a major impediment to development of low and moderate income housing.

Improvement of housing in the rural southern states is made more difficult because a key element in low-income housing development is missing in most communities—the presence of local housing organizations and non-profit groups. Without such groups, poor housing conditions may be overlooked as an unfortunate but unresolvable byproduct of poverty. Or, to the extent that programs are undertaken, the targeted families may be lost in the shuffle of federal and state officials and for-profit developers. In the few communities where such groups do exist, their contribution to the housing effort is invaluable. Where non-profit groups do exist, they are often thinly funded and in need of technical and legal assistance.

Finally, legal tools used in the rest of the country for addressing housing problems may be lacking or may require approaches and solutions not common in urban areas of the country. For example, landlord-tenant laws and fair housing laws are two familiar legal avenues for addressing housing issues. Southern states have lagged far behind the rest of the nation in passage of landlord-tenant laws. And where they do exist, the nature of much of the rental housing requires a different approach to their use. Mississippi has recently passed a landlord-tenant statute that is the focus of my article at page 527. As the article explains, use of the habitability provision of the Act may be inappropriate for some housing. Fair housing laws may also require a different approach. For example, participants at the housing workshop described below agreed that testing, a commonly used method of initiating fair housing cases, may simply be unworkable in rural and small town settings as presently practiced. The article at page 579 describes one attorney's experience with fair housing cases in the south and his analysis of the need for a theory of jury nullification.

In summary, the distinctive history, geography, politics, and population of Mississippi and similarly situated states suggest the value of exploring housing solutions unique to the region. While the southern states are unlikely to produce general revenues for housing, there are sources of funds that do not require general appropriations. These measures, some of which are discussed in the article at page 605, require careful study and analysis to determine the amount that could be generated by each source, the population that would bare the expense, the cost of each, and the economic effect on the state. Most southern non-profit housing organizations agree on the need to study and develop a detailed model for rural, very low-income housing that would include an analysis of barriers to production, physical models for very low-cost units suitable for rural areas, suggested funding packages, and guidelines for realistic financial projections. And there is definitely a need to study and analyze the impact and effectiveness of housing laws, and to develop models for their use in rural and small town settings.

There is no statewide or regional center to undertake projects such as those outlined above. Most state housing corporations are focused on the daily operation of existing federal and state programs, and most non-profit organizations lack the staff to undertake such long term studies. A law school clinic, in conjunction with the volunteer bar and other departments in the University, is well-suited to undertake many of these projects. Providing this service may well be the most effective way for law schools, students and attorneys to provide service to the low-income community in housing. At a minimum, it will be a valuable addition to the individual client representation. From an educational perspective, the idea of having students study housing law, represent individuals in housing cases, and work on housing projects of regional scope is an excellent way to combine practical application, policy considerations, and theoretical perspectives in one course.

With this plan in mind, the law school in November 1991 convened a group of housing attorneys and advocates from Mississippi, Arkansas, and Alabama to discuss housing issues and the possible role that a clinic could play as a regional housing law center. The idea was to bring together housing advocates and community groups from the three states to identify common housing issues, discuss priority of those issues, and develop recommendations on how a law school clinic could assist to improve low-income housing efforts in the region. An informal survey of the three states during the previous summer revealed a very small number of housing lawyers and non-profit community housing groups. A high percentage of those contacted attended the workshop, along with housing law experts and representatives of national housing groups invited to offer commentary on the discussion. The group included legal services lawyers from the three states and several private lawyers from the Mississippi Young Lawyers' Section, members of a recently formed YLS Housing Committee. Non-profit community housing developers sent representatives with a wealth of personal experience in housing production and a broad knowledge of federal programs. Representatives of the Harvard Joint Center for Housing Studies, International Habitat, the American Bar Association Project on Housing and the Homeless, the Washington Lawyer's Committee for Civil Rights, the Mississippi Home Corporation, the ABA Affordable Housing Section, and Harvard k'law professors completed the very diverse group.

Informal panels led workshops on four substantive areas: housing discrimination; private landlord-tenant law; funding sources for development; and program design for rural housing development. In each workshop, the group focused on analyzing problems specific to the region and discussing possible solutions geared to rural southern states. On the last day of the workshop, the group divided into four small groups to review the earlier discussions and propose specific ways in which a clinic could provide assistance in each area.

Not surprisingly, the problems identified were fairly consistent across state lines. Extreme poverty, and very bad rural housing, landlord bias in state laws, lack of state funding and local credit, federal programs with requirements not suited to rural areas, lack of local development capacity, infrastructure, and access to land, persistent racism — the list was fairly long, as were the suggestions for directions a clinic might take in providing assistance. There was general agreement that developing clinical capacity to provide local groups with technical assistance would be a valuable addition to housing resources.

This issue of the *Mississippi Law Journal* collects the key articles from the November Housing Symposium. The articles by Relman, Abromowitz, Bell, and Beard/Hopkins reflect the core of the presentations made at the symposium. The other two articles were written by students in housing law. The first student article reflects in more detail housing conditions in Mississippi, and the second describes some potential funding and programmatic efforts.

This symposium is only a first step towards identifying and providing solutions to the southern housing problem. But, all worthwhile projects begin by taking a first step.

CURRENT HOUSING CONDITIONS IN MISSISSIPPI

INTRODUCTION

> *Karen and Jay were married in 1988. After Karen gave birth to their daughter, she and Jay decided to buy a house. The couple had been renting a trailer. Both Karen and Jay work full time; however, the everyday expenses of life — and the cost of a new baby — did not leave them with extra money to put into savings for a down payment on a house.*
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> *In 1989, Karen and Jay applied for a government-subsidized home in the small town of Oxford, Mississippi. Their combined income and the fact that they had a child qualified them for assistance. Their application remained dormant, however, for two years before they were interviewed for the loan. By this time, Jay had received a raise which placed their income slightly over the maximum allowed for a government loan to purchase a house. Karen and Jay were denied the loan, and their hopes of purchasing a house were gone.*
>
> *Karen works as a legal secretary and earns $950.00 per month. Jay, a welder, earns $8.00 an hour. Both wanted to stop paying rent and purchase their own house. Both also realized, however, that with their combined salaries it would take years to save what would be required for a minimum down payment. As an alternative, Karen and Jay purchased a trailer, which they placed on Karen's parents' property. With their current occupations and the housing market as it is, Karen and Jay will probably never be able to realize the "American Dream" and own their own home.*

Over a half century ago Congress optimistically stated its intent that every American should have access to safe, decent, and affordable housing.[1] During the past decade, however, the

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[1] Housing Act of 1949, Pub. L. No. 81-171, $ 502,63 Stat. 413 (1949). One "goal" included in the preamble is "a decent home and a suitable living environment for every American family." *Id.* at 413. The goal was reaffirmed by Congress in 1990. *See* Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, $ 102, 104 Stat.

United States has experienced housing trends which marked a decline in the living conditions for many American families and which indicate even more serious housing problems on the horizon. The first of these trends was a decline in home ownership.[2] For each year from 1980 to 1987, the percentage of Americans who could afford to purchase their own home decreased.[3] Furthermore, the number of America's homeless increased by dramatic numbers.[4] The nation's rental housing also, declined in quality, availability, and affordability to the point that over half of the nation's tenants live in units the government classifies as inadequate or overcrowded.[5] Fourth, the nation's poor faced a crisis in seeking available affordable housing, and finally, there was a general decline in the quality of the country's existing housing, placing more and more families in inadequate units.[6]

The nation's housing problems are reflected in a study by the Harvard Joint Center for Housing Studies which states that "America is increasingly becoming a nation of housing haves and have-nots. While the majority of American homeowners are well housed and have significant equity in their homes, the prosperity of these homeowners does not reflect the plight of the nation's growing number of low and moderate income households."[7]

Mississippi's low and moderate income families face many of the same problems which plague the country as a whole. Over twelve percent of the state's owner-occupied homes in 1980 were "overcrowded, lacked full bathrooms, or were of low value."[8] In some rural areas twenty percent of these units were substandard

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4079, 4085 (1990).

[2] The Need for a New National Housing Policy, at 3 [hereinafter New Housing Policy].

[3] *Id.* This trend followed a 35 year increase in the percentage of Americans who could afford to purchase a home. *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* During this period, more than 30 million families were living in inadequate housing units or in units which the government classified as having "a housing problem." *Id.*

[7] *Joint Center for Housing Studies of Harvard University, The State of the Nation's Housing* (1988) [hereinafter *Nation's Housing*].

[8] *State of Mississippi Comprehensive Housing Affordability Strategy, 1992*, Mississippi Home Corporation, at 5 [hereinafter *Housing Strategy*].

and in need of major repairs.[9] These numbers are dramatically increased for poverty-level owner-occupied units. According to 1980 census figures, 197,000 Mississippi households, or about one-fourth of the state's households, earned incomes below the poverty level.[10] While over half of these households owned their own homes, close to twenty percent of these homes were overcrowded or in need of additional plumbing.[11] The U.S. Department of Housing and Urban Development (HUD) estimates in 1990 indicate that almost 70,000 renter households were in need of rental assistance.[12] Regardless of what type of housing is being sought by Mississippi citizens, the largest single factor making it difficult for them to find affordable housing is low household incomes.[13]

Affordability has become the largest housing problem for American families. While government spending on housing has grown tremendously in the last twenty years,[14] a very small percentage of those low income households which are eligible for benefits have participated in government programs.[15] In fact, according to governmental poverty definitions, only twenty-eight percent of the country's 7.5 million poverty level rental households lived in some form of federally subsidized rental housing in 1987.[16]

For the past two decades, Congress has attempted to improve the country's housing conditions primarily in two basic ways: direct spending programs and indirect assistance.[17] One innovative form of indirect assistance is the low-income housing tax credit which was created by the Tax Reform Act of 1986.[18] It was intended to increase the production of new low-income housing and promote the rehabilitation of existing low-income housing through tax incentives.[19] Many sources indicate the critical need for low-income housing and predict that the future demand will exceed the available supply by a tremendous amount of units if something is not done to remedy the situation.[20] While the low-income tax credit has been effective in producing low-income housing units recently, its continued use along with other programs which produce affordable housing is necessary to improve the housing conditions of the poor and assure that they have a place to live.[21]

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[9] *Id.* A significant percentage of these substandard conditions existed in counties located within the Mississippi Delta. *Id.* at Table 5.

[10] *Id.* at 5.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 13.

[14] *Nation's Housing*, *supra* note 7, at 17. The Housing and Community Development Act of 1974 greatly increased the number utilizing governmental assistance. *Id.*; *see* Housing and Community Development Act of 1974, Pub. L. No 93-383, $201, 88 Stat. 633 (1974). As a result, by 1987 the total number of people living in federally subsidized housing increased almost 73%. *Nation's Housing*, *supra* note 7, at 17.

[15] *Nation's Housing*, *supra* note 7, at 17. Fewer than one-third of renter households with yearly incomes below $5,000 and less than a quarter with incomes between $5,000 and $10,000 received any form of rental assistance in 1987. *Id.*

[16] *Id.* at 18.

[17] *See generally* Congressional Budget Office, U.S. Congress, Current Housing

MISSISSIPPI'S HOUSING STATISTICS

In 1987, sixty-three percent of all households below the poverty level were living in rental housing.[22] The median income for all renters in 1986 was $15,300, only half the median income of homeowners, and the number of renter households with incomes under $5,000 grew from 2.7 million in 1974 to 4.7 million in 1987.[23] Between 1970 and 1983, median rents increased at about twice the rate of median incomes.[24] In 1975, the number of low-income renter households that paid more than fifty percent of income for rent was 3.7 million; by 1983, the number had increased to 6.3 million, or half of all low-income renters.[25]

Problems and Possible Federal Responses (1988).

[18] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

[19] Frank A. Racaniello, *Extending the Low-Income Housing Tax Credit: An Empirical Analysis*, 22 RUTGERS L.J. 753, 753 (1991).

[20] *Id.* at 754. By 1993, the nationwide demand will exceed the supply by over 4 million units. *Id.*; *see also U.S. Census and Department of Housing and Urban Development, Annual Housing Survey, 1974 and 1983* (1983) (predicting that by 2003 demand will exceed supply by 7.8 million units).

[21] Racaniello, *supra* note 19, at 760-62. The Tax Credit assisted the production of over 100,000 low-income housing units in 1987 and 1988, and its use is increasing. *Id.*

[22] *National Housing Task Force, A Decent Place to Live: The Report of the National Housing Task Force* 6 (1988).

[23] *Id.* at 13.

[24] *Id.* at 8.

[25] *Id.* at 9.

In 1990, Mississippi had 911,374 occupied housing units, 259,787 of which were occupied by renters.[26] With over twenty-eight percent of its citizens renting, the state falls significantly below the national renter-occupied percentage of thirty-five.[27] The nationwide median price for each rental unit was $374, while Mississippi's was $215.[28] Furthermore, each housing unit within the country houses 2.63 persons per household, while Mississippi is slightly higher at 2.75 persons per household.[29]

In 1980, rental housing comprised thirty percent of all occupied units; however, they comprised fifty percent of the state's housing units which lacked a full bathroom or which were considered overcrowded.[30] Additionally, forty-five percent of the state's rental housing units had specific characteristics indicating the possibility of substandard conditions, while only twelve percent of the owner-occupied housing units in the state contained the same characteristics.[31]

Further evidence that Mississippi's rental housing is in poorer condition than owner-occupied housing can be seen from examining the conditions available to poverty-level renter households, of which thirty-five percent lacked full plumbing or were overcrowded.[32] This rate of inadequate housing is just under triple that of the rest of the state.[33]

> *Heddie Bell lives in a house which, in 1987, was condemned by health officials. The house has no running water, no plumbing; a water hydrant is located on the front porch, and a weathered outhouse serves as the bathroom The walls of the house are stone, the cement roof is flat, and the few windows are covered with plastic. The porch is without support and*

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[26] U.S. Census 1990. Population and Housing Characteristics for the United States, Summary Tape File 1A, 1990.

[27] *Id.*; *see* Population and Housing Characteristics, Mississippi, 1990, for a breakdown of counties and districts [hereinafter Housing Characteristics].

[28] *Id.*

[29] *Id.*

[30] *Housing Strategy*, *supra* note 8, at 4. Overcrowded units are units having over one person per room. *Id.*

[31] *Id.* Characteristics indicating the possibility of substandard housing include a lack of complete plumbing, overcrowding, or rents of over 30% of the renter's income. *Id.*

[32] *Id.*

[33] *Id.*

bends under a person's weight; the floor inside the house is not much sturdier. Heddie Bell has applied for several positions as a maid, but all local motels require their personnel be able to read and write; she is illiterate. Heddie Bell has lived in this house for years, and has done her best to make the house livable. She has hung wallpaper and pictures on the wall and for Christmas put up a tree with old decorations. But the floor still sags beneath her when she walks, the flat roof sags because of years of rain, and wind still chills the house because of the holes in the walls.

A short distance down the road, Hester lives with her three young children in a house almost identical to Heddie Bell's. On cold days and nights, Hester and her children must gather in the center of the main room around a wood-burning stove — their only source of heat. The front door to the house is no longer able to be used, so a thick sheet of plastic covers the entrance. Even on a sunny winter afternoon, the children must wear jackets inside to stay warm. The one light in the center of the main room barely lights the house, and Hester has hung almost anything — a calendar from years ago, a large pictureless picture frame -- to cover the holes in the walls.

Heddie Bell and Hester live in the Mississippi Delta in an area known as "McLemore Alley." When Jessie Jackson spoke of Tunica County as "Ethiopia in Mississippi," national attention focused on the Delta and, in particular, a community called "Sugar Ditch." While efforts were made to improve the living conditions of the residents of Sugar Ditch, there remained untold number of similar communities spread throughout the Delta. McLemore Alley is an example.

Walls, Mississippi, is a small Delta town in DeSoto County. The fertile land of Walls, which was originally part of the Mississippi River until the river changed course, is farmed by a few large landowners. One such large plantation was owned by Joe Sanders. In the 1930s and 1940s, Sanders had many people working for him in his fields. For these workers and their families, Sanders built homes on the outskirts of his property; rent was deducted from the workers' paychecks. The small stone houses lined the street and created a small community. The community on Sanders's plantation in Walls was called "McLemore Alley."

In the late 1970s, Sanders sold his property to D.C. Flowers and Richard Parker. At the same time, technological advances *meant fewer and fewer workers were needed on the plantation. While families continued to live in the houses originally built for Sanders's workers, the condition of the houses deteriorated. In addition, few of the remaining tenants actually worked for the landowners. In 1987, a complaint of open sewage was filed with the local health department, and McLemore Alley was subsequently condemned. At this time, Flowers and Parker were given a choice. They could repair the houses and continue to rent them to the tenants, or they could evict the tenants and tear down the houses; they chose the latter.*

What appeared to be the simple solution turned out to be anything but. When Flowers and Parker served the tenants with eviction notices, the tenants simply ignored them and refused to leave their homes. Because they had not improved the condition of the houses, Flowers and Parker could no longer charge rent. Thus began the dilemma. The tenants did not want to leave their homes, for many of them the only home they had ever known. The owners — successful farmers form Tunica county — were not interested in becoming landlords and simply wished to do away with the houses.

Around this same time, the Mississippi Home Corporation (MHC), a state agency, became involved with the problem of the residents of McLemore Alley. The MHC persuaded the local officials and landowners to allow it time to pursue a Farmers' Home Administration Grant. The grant would have provided for three forty-unit dwellings to be built where McLemore Alley is now located. The problem: This property was zoned agricultural. What ensued was a struggle to have the property re-zoned. Proponents of the re-zoning had to go before the county planning commission three times and the board of supervisors twice before the four acres were re-zoned residential. After the re-zoning was approved by the board of supervisors, white residents sued to stop the re-zoning. After months of consideration, a local judge ruled the re-zoning was proper.

For the next two years the residents of McLemore Alley waited and wondered. In 1989, the health department again received complaints and the landowners were once again told to evict the tenants. It was then discovered that the MHC had encountered difficulty in getting a sewage system approved for the project; the Farmers' Home Administration Grant fell through. However, the MHC then began working with Missis-

> *sippi Action for Community Education (MACE). The plan with MACE was to buy twenty acres from Flowers and Parker and build thirty single-dwelling houses for working residents. At the present time, the land has been sold for $150,000, $100,000 of which was donated by the Sacred Heart Southern Missions. But two obstacles remain: a sewage system has to be approved and the current residents have to be relocated while construction is underway.*
>
> *Local authorities are working with MACE to approve a plan for sewage. The relocation of the present tenants of McLemore Alley could serve as a model for future efforts of this kind. Fifteen trailers have been donated for this project. The current residents whose houses will be torn down will live in these trailers for one year while the new units are being constructed. After the new homes are completed, working individuals will be moved in. The trailers will then be moved to another location for a similar project.*
>
> *The story of McLemore Alley is far from unique. Throughout the Delta such vestiges of the Great Depression remain. Many landowners have already destroyed such homes on their property. Some burn them, while others simply bulldoze them and damage them just enough to make it impossible for a person to live there. Many of the older people who live in these houses were born there. For the most part, they are illiterate and poor and survive on food stamps and welfare checks. And, for the most part, they have been ignored for decades. But now progress has caught up with then, and government agencies, religious organizations, and individuals are trying to improve their living conditions.*

Certain areas of the state are in worse condition than others. Of all the poverty-level rental units in the state which are inadequate because of a lack of plumbing, over eighty percent are located in rural areas of the state and in towns containing fewer than 2,500 people.[34] The Mississippi Delta counties[35] face special housing problems as compared to the rest of the state.[36] Of these eleven Delta counties, not one has a median value owner-occupied home equivalent to the state's median value of $45,600.[37] The median value rental unit in these counties is also significantly lower when compared to the rest of the state.[38] In addition, these eleven counties are all included within the thirteen statewide counties where over ten percent of the occupied units were overcrowded in 1990.[39] Nine of the Delta counties also had median family incomes of eighty percent or less than the statewide median family income for 1991.[40] Besides indicating that the Mississippi Delta is one of the poorest sections of the state, these numbers also show the need for housing assistance in this area as well as the need for policies aimed at eliminating overcrowding and increasing household incomes.[41]

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[34] *Id.* at 4.

[35] For purposes of comparison to the rest of the counties in the state, the following counties represent the Mississippi Delta: Bolivar, Coahoma, Holmes, Humphreys, Issaquena, Leflore, Tallahatchie, Tunica, Sharkey, Sunflower, and Washington.

According to 1990 estimates of HUD, rental assistance is needed by an estimated 69,000 renter households in Mississippi. An additional 15,000 single-member elderly renter households were potentially in need of assistance either because of the low quality of their housing or because of their low incomes. The MHC further estimates that another 100,000 households of various sizes could possibly qualify for governmental assistance and were in need of assistance.[42] As evidenced by these numbers, it is clear that the amounts needed for rental assistance are greatly in excess of the resources available to the state.[43]

Compared to the condition of rental housing in Mississippi, owner-occupied housing is slightly better. Seventy-one percent of occupied housing in Mississippi was occupied by its owner in 1990.[44] In 1980, twelve percent of all owner-occupied housing was overcrowded, lacked full bathrooms, or was of low value.[45] Almost twenty percent of homeowner units lacked full plumbing or had more than one person per room; sixty percent of all poverty-level homeowner units that lacked full plumbing were located in towns of more than 2,500.[46] In 1980, of 197,000 Mississippi households earning incomes below the poverty level,[47] fifty-five percent of these households owned their own homes.[48] Mississippi's median family income for 1991 is estimated at $25,600.[49] In 1991, sixty-three percent of Mississippi's renter households could not afford the 1990 median value home priced at $45,000.[50] Almost forty percent of owner households could not afford the 1990 median value home.[51]

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[36] Housing Characteristics, *supra* note 27, at Tables 9-12.

[37] *Id.*

[38] *Id.*

[39] Mississippi 1990: Summary Tape File 1A, U.S. Department of Commerce, Bureau of the Census, May 1991.

[40] U.S. Dept. of Housing and Urban Development, February 1, 1991.

[41] *Housing Strategy*, *supra* note 8, at 5.

[42] *Id.* The MHC states that if a monthly rental assistance of $250 were given only to those households earning less than half the state's median income, it would cost over $19 million per year. *Id.*

[43] *Id.*

[44] *Mississippi Home Corporation, State of Mississippi Comprehensive Housing Affordability Strategy 1992* 3 (1991) [hereinafter *Housing Affordability Strategy*]. This percentage has remained stable over the past decade, since the percentage of home own-

SPECIAL NEEDS POPULATIONS IN MISSISSIPPI

There are several groups of people in Mississippi who have more particular housing needs than the average citizen. These groups include the homeless, the elderly, mentally and physically handicapped persons, and persons with Acquired Immune Deficiency Syndrome (AIDS).

A. Homeless Persons

America's homeless have been a topic of increasing discussion in recent years and provide the most obvious reason for changes in our national housing policies. Many of the nation's homeless have mental and physical disabilities, and many need job training or employment assistance.[52] Estimates of the num-

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ership in Mississippi was also 71% in 1980. *Id.*

[45] *Id.* at 5. 12% of all owner-occupied housing is equal to over 72,000 units. *Id.*

[46] *Id.*

[47] *Id.* 23% of all households in the state earn incomes below the poverty level. *Id.*

[48] *Id.*

[49] *Housing Affordability Strategy*, *supra* note 44, at 3. In metro areas in Mississippi, the median family income was $31,000, while in nonmetro areas it was $23,500. *Id.*

[50] *Id.* at 4. A median value home has a value "that has exactly one-half of homes priced above it an[d] one-half priced below it. It is determined from the actual sales prices of homes sold over a given period of time." *Id.* at 4 n.3.

[51] *Id.* at 4. In metro areas, 54% of renter households and 28% of owner households could not afford the median value house. *Id.* In nonmetro areas, 67% of renter households and 44% of owner households could not afford the 1990 median value house. *Id.*

[52] *National Housing Task Force*, *supra* note 22, at 13.

ber of homeless vary widely and range from the thousands to the millions.[53] Despite significant differences between various groups' estimations, there is little doubt that the homeless population is quickly increasing. The National Task Force has stated that "[w]hile there is honest disagreement over the number of homeless Americans, we know that the homeless population is growing."[54] The critical level of the national problem is illustrated by the fact that there are significantly more homeless persons than there are available shelter facilities. In 1985, the House Committee on Government Operations "judged the gap between the need and the capacity to provide even the most basic shelter to be 'enormous' — and rapidly increasing."[55]

Recent efforts to determine who constitute the country's homeless provide unstereotypical information. To a great extent, those becoming homeless today are functioning, capable adults and families with children who have been forced onto the streets because of economic conditions. "It is virtually undisputed that the dearth of affordable housing is probably the major cause of homelessness in America."[56]

> *When Anne and her ex-husband, Kent, were married in 1985, they bought a three-bedroom house in a nice community in Gulfport, Mississippi. Anne, a paralegal, and Kent, a young attorney, were able to purchase the house and make monthly mortgage payments because of their combined incomes. When Anne and Kent divorced in 1989, neither of them could individually afford the house. With very little equity in the house, there was no chance to sell it and profit from it; instead, Kent decided to keep the house. He moved to another city in Mississippi, and now rents the house.*
>
> *Anne earned $250.00 a week when she divorced. At that time, there were several credit cards in her name, which she re-*

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[53] New Housing Policy, *supra* note 2, at 26. HUD estimates in 1983 the homeless population was between 250,000 and 350,000. *Id.* Estimates by other groups and agencies at that time included 1 - 3 million by the Department of Health and Human Services, 2.5 million by the National Housing Law Project and the National Housing Conference, and 2-3 million by the Center for Creative Non-Violence. *Id.*

[54] *National Housing Task Force*, *supra* note 22, at 13.

[55] New Housing Policy, *supra* note 2, at 27.

[56] *Id.* at 28. Various studies have concluded that new homelessness is caused primarily from the unavailability of affordable housing for low income households. *Id.*

> *mained obligated to pay. She also had purchased her own car, which had monthly notes of $300.00, and car insurance was $50.00 each month. After these few bills were paid, Anne's remaining income each month was $250.00. The house in which she had lived for four years was no longer available to her. Anne was faced with no other choice but to move back home with her parents.*
>
> *For two years, thirty-two year old Anne has lived in her parents' home — the home in which she grew up. She has received periodic raises, but she still does not earn enough to allow her to move into her own small apartment. The thought of buying a house has never occurred to her. Anne is one of what is commonly referred to as the invisible homeless. While she does have a nice place to sleep at night and to keep her belongings, it is not "hers." If not for sympathetic relatives, Anne might very well be homeless.*
>
> *Anne's parents do not require rent from her. Anne does help out with groceries and with housekeeping, and she and her parents have a very close relationship. She is currently attending night school and pursuing a degree in education. With her current expenses and salary, however, Anne will not be able to move out of her parents' home and into her own home within the near future.*

Anne is one of Mississippi's invisible homeless, forced by the lack of available affordable housing to move in with friends or relatives. These are people and families who are vulnerable to homelessness at any given time. A layoff, domestic argument, or a homeowner who simply gets tired of having the extra burden could produce a homeless family. The New York Partnership for the Homeless estimates there are "10 million doubled-up families nationally" while other estimates vary from 4 to 14 million.[57] Of twenty-nine cities surveyed by the U.S. Conference of Mayors in May 1984, all reported that "the number of families 'temporarily' living with friends or relatives had increased over the previous year."[58]

Mississippi attempted to count the state's homeless population for the first time in 1987 and estimated there to be 2,300 homeless in the state.[59] In 1988, surveys were taken of homeless service providers throughout the state; an estimated 30,000 people were being assisted by the State Department of Human Services, and that number increased to over 35,000 in 1989.[60] Two main flaws are evident from these methods of estimation. The second statistic is higher than the number of homeless; it records number of persons served and does not adjust for repeated services to one person. However, the numbers do indicate a dramatic increase in the number utilizing homeless services. Secondly, the first estimate does not account for the state's "invisible" homeless which are represented by the state's statistics on overcrowded housing units.[61]

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[57] *Id.*

[58] *Id.*

Mississippi now has three Community Action Agencies which provide services other than shelter or overnight programs.[62] There are twenty-two shelters for abandoned, abused, and neglected homeless youth in Mississippi.[63] Also, there are fifteen domestic violence shelters in operation in Mississippi, the largest handling seventy-seven persons per month.[64] There are twenty shelters for homeless individuals and families, but only fourteen of these provide overnight shelter to family groups.[65] Finally, there are thirty special needs facilities providing alcohol and drug treatment service to persons who are temporarily homeless because of their chemical dependency.[66]

B. Elderly Persons

Another important special needs group in Mississippi is this state's elderly citizens. Elderly citizens make up one-fourth of Mississippi's homeowners.[67] Over 18,000 elderly occupied units, or nine percent of all elderly units in Mississippi, lack complete plumbing.[68] Over eighty percent of all elderly occupied units without complete plumbing are located in rural areas or small towns of fewer than 2,500 persons.[69]

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[59] *Housing Strategy*, *supra* note 8, at 6.

[60] *Id.*

[61] *Id.*

[62] *Housing Affordability Strategy*, *supra* note 44, at 6.

[63] *Id.*

[64] *Id.* Other than basic needs such as shelter, food, and health care, these domestic violence facilities provide protection, legal assistance, counseling, child care, and employment assistance. *Id.*

[65] *Id.* at 15.

[66] *Id.*

[67] *Id.* at 7.

Elderly citizens face more complex problems with housing than do non-elderly citizens. Along with substandard conditions, high costs of housing, and little assistance from government, elderly citizens are also limited by fixed incomes, high medical costs, and physical restrictions.[70] Over 28,000 elderly Mississippians qualify for HUD assisted elderly housing because their incomes are low enough, and over eighty percent of these live in rural areas.[71] The MHC estimates that more than 26,000 one- and two-member elderly renter households would potentially qualify for housing assistance because of low incomes.[72]

C. *Mentally and Physically Handicapped Persons*

A third group of Mississippians with particular needs is the mentally and physically handicapped persons. A 1990 national survey of states observed that "housing programs for people with serious mental illness in Mississippi are among the worst in the nation."[73] In caring for the mentally handicapped, families, board, and care homes provide most permanent housing.[74] To provide shelter for the mentally and physically handicapped persons, Mississippi provides "more than 200 group home beds and a few dozen supervised or supported apartment slots."[75] More national attention has been given in recent years to the problems of physically handicapped person, such as better access to buildings, restroom design, elevator design, and public space access.[76] Mississippi has yet not identified the approximate number of physically handicapped persons who need appropriate housing, but must do so in order better to serve the needs of these citizens.[77]

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Memorandum from Executive Committee of the Housing Task Force to Governor Ray Mabus* 2 (Sept. 29, 1988).

[72] *Housing Affordability Strategy*, *supra* note 44, at 5.

[73] *Id.* at 8.

[74] *Id.*

[75] *Id.*

[76] *Id.*

D. Persons with AIDS

The fourth identified special needs group in Mississippi is persons with AIDS. There were 686 identified persons with AIDS in Mississippi in January of 1991.[78] According to recent AIDS statistics, more than fifty percent of people with AIDS live "in the central Mississippi Public Health District surrounding Jackson, and in the Health District in the Gulf Coast, but every health district has AIDS cases."[79]

Individuals with AIDS have specialized problems with housing because of rejection from relatives and because neighborhood groups frequently resist having homes for AIDS victims built in their area.[80] AIDS patients also have a special need for medical care in addition to shelter, which makes their housing problems even more challenging. Unfortunately, there are currently only two group homes for AIDS patients, one in Jackson and one in Ocean Springs.[81]

MISSISSIPPI'S HOUSING PRODUCTION NEEDS

> *Lisa, a twenty-eight year old mother of two, used to be afraid to sit on the porch of her apartment after dark. Her nine year old son, Anthony, once found a medicine bottle in his backyard — with twenty "rocks" of cocaine in it. Most of the parents of friends of Lisa's children were using drugs. Drug deals were made right outside her window, and shootings were common occurrences. Lisa and her two sons lived in a now-closed government housing project. They now live in C.B. Webb, another government housing development in Oxford.*
>
> *Lisa has worked on-and-off as a cook since she graduated from high school. However, with herself and two children to support, she has never been able to earn enough to move into*

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[77] *Id.*

[78] *Id.* 60% of all Mississippians known to have AIDS are white. *Id.*

[79] *Id.* at 9.

[80] *Id.*

[81] *Id.*

> *an apartment. Lisa must rent, and the amount she can pay for rent is small. Seven years ago she was working at the local retardation center and paid $123.00 rent each month. As changes in employment occurred, so did decreases in salary — and decreases in amount of rent she could pay. Lisa moved to her current apartment on June 1, 1991. She is currently unemployed, but she is seeking employment. For herself and her two sons, Lisa receives $278.00 each month in food stamps. She also receives a welfare check for $120.00 each month, and the children's father pays $50.00 child support each month. Her electricity bill is $25.00 to $50.00 each month, cable is $20.00, and she has no phone; for rent, Lisa pays $23.00 a month. After she pays the expenses, Lisa usually has about $60.00 remaining, which she spends on her two sons for clothing and miscellaneous expenses.*
>
> *When asked where she would have lived had C.B. Webb not been available to her, Lisa's silence served as her answer. After considering the question, she finally answered, "I don't know. I just don't know." If C.B. Webb were no longer available to her, Lisa and her two children would probably be homeless.*

Federal government programs and the Farmer's Home Administration supplied the state with almost 40,000 housing units between 1980 and 1990.[82] From 1987-1991, the Federal Low Income Housing Tax Credit has provided for the production or rehabilitation of over 4,000 multi- and single family rental housing units.[83] While federal programs have helped the state meet some of its housing needs, spending on new construction fell by one-third between 1980 and 1988.[84]

In order to provide sufficient housing, the state must make sure that new units are being produced as well as maintain the housing which already exists. For the decade preceding 1990, Mississippi needed 136,000 new housing units because of the growing population and to replace those lost to natural disasters and other causes.[85] During that same time period, 142,000 new units were added to the state's existing housing stock.[86] However, these figures do not account for the roughly 109,000 substandard housing units which existed in 1980; it would have required the additional production of over 95,000 more units during the decade just to replace those.[87]

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[82] *Housing Strategy*, *supra* note 8, at 11.

[83] *Id.* 65% of these units were located in nonmetro counties. *Id.*

[84] *Id.* at 10.

[85] *Id.*

By projecting the state's household growth rates and considering losses to the existing housing stock, the MHC suggests that "another 73,000 housing units will be needed between 1992 and 1996."[88] If production continues at its present average of 10,500 units per year, it will fall short of replacing existing substandard housing by 20,000 units.[89] To cure this shortcoming, overall production rates need to increase forty percent over the 1988-1990 production levels.[90] If affordable housing is not more available to low-income households, their housing conditions can be expected to deteriorate.[91]

In the past, Mississippi has primarily depended on the federal government for housing assistance for low and moderate income families. However, federal spending on new construction has decreased by one-third between 1980 and 1990.[92] In addition, between 1979 and 1988, total obligations for new units under HUD Section 8, public housing, and Farmers Home Section 515 decreased from $184 million to $115.8 million, a thirty-seven percent drop.[93] In the nine-year period, new public housing units dropped from 455 units to 106 units.[94] The Farmer's Home Section 515 program subsidized approximately 1,158 units per year from 1979 and 1981; by 1990, this number had been reduced by sixty-three percent.[95] According to MHC, "At this rate, it would take existing federal housing programs acting alone over 40 years to assist the 65,000 households with low incomes to find quality, affordable housing."[96]

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[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 11. Between 1988 and 1991, Mississippi averaged an increase of single and multi-family housing units of 10,500 units each year. *Id.*

[91] *Id.*

[92] *Housing Affordability Strategy*, *supra* note 44, at 10.

[93] *Id.* at 12-13.

[94] *Id.*

[95] *Id.* at 13.

CONCLUSION

In Mississippi, housing problems are magnified due to the rural way of life and the financial problems in the state. Mississippi does not have enough affordable, decent rental housing units, nor does it have enough affordable, decent housing units which Mississippians can purchase. The state has a growing problem with homeless individuals and families, as well as an overall lack of housing and other services for all special needs groups.

Jennifer Parkinson
Pamela Gunter
Joey Warwick

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[96] *Id.*

THE MISSISSIPPI LANDLORD-TENANT ACT OF 1991

*Deborah H. Bell**

The last twenty years have witnessed a remarkable reordering of landlord-tenant law in most of the nation. Previously, landlords had almost no responsibilities during the tenancy. Basically, a landlord who refrained from disturbing the tenant had met his common law obligation. It was the tenant's obligation to make any necessary repairs. If the tenant left before the term expired, the landlord had no duty to mitigate damages by reletting the premises. Once the term lapsed, the tenant had almost no rights. By giving the proper notice, a landlord could terminate a tenancy or refuse to renew a lease for any reason. According to the English rule, the landlord could then remove the tenant himself through "reasonable force" without resorting to judicial process. Beginning in the late 1960s, concern about housing shortages and poor housing conditions prompted a drastic redefinition of the landlord-tenant relationship.

Today in most states, landlords must provide dwellings at a minimum level of habitability. The traditional right to terminate tenancies for any reason has been undercut by decisions and statutes which prohibit retaliatory eviction. By emphasizing the contractual aspects of leases, courts have required landlords to mitigate damages by making reasonable efforts to relet when tenants abandon the unit. In addition, the mandatory use of state summary disposses remedies for eviction has ended the common law right of self-help eviction in many states. These developments provide tenants with significantly improved legal devices for ensuring housing quality and for preventing unjustified eviction.

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This revolution in landlord-tenant law never quite made it to the South. A review of landlord-tenant law in Mississippi, Arkansas, Louisiana, Alabama, Tennessee, and Kentucky reveals that only a small percentage of tenants in those states can require even the most basic and necessary repairs from their landlords.[1] Until last year, Mississippi, Alabama, and Arkansas were three of the remaining four states in the country where landlords had no general duty to repair.[2] Tennessee and Kentucky have landlord-tenant statutes, but they impose repair obligations only on urban landlords, effectively excluding a large number of the renter households in those rural states.[3] In an interesting contrast to the rest of the country, Louisiana has required landlords to repair for most of this century.[4] Unfortunately, the right is illusory for most low-income persons since tenants cannot use the landlord's breach defensively in a rent or eviction action.[5] In Arkansas, the legislative reluctance to enact tenants' rights laws reaches an unparalleled extreme; it is a crime for a tenant to fail to pay rent on time.[6] By failing to pay rent when due, the tenant forfeits the right to continued occupancy and is liable for a separate criminal offense for each day that he remains after the landlord has given a ten day notice to vacate.[7]

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[1] The southern states on the East Coast have enacted statewide repair obligations. *See* GA. CODE ANN. § 44-7-13 (1991); FLA. STAT. ANN. § 82-51, .56 (West 1987); S.C. CODE ANN. § 27-40-440 (Law. Co-op 1991).

[2] Apparently only Arkansas, Alabama, and Wyoming are now without some form of judicially imposed warranty or statute imposing a repair obligation.

[3] *See* TENN. CODE ANN. § 66-28-102 (1982) (limited to counties having population of more than 200,000). In 1974, Kentucky adopted the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.101, 7B U.L.A. 430 (1991) [hereinafter Uniform Act or URLTA] applicable only to cities and urban county governments. KY. REV. STAT. 383.505 (Baldwin 1974) (repealed 1984). The Kentucky Supreme Court held the Uniform Act to be unconstitutional in Miles v. Shauntee, 664 S.W.2d 512 (Ky. 1983) as special legislation. The legislature subsequently repealed the Act and passed a statute that could be adopted on a local option basis. Only the states three urban centers, Lexington, Louisville, and Covington have adopted it. *See* KY. REV. STAT. 338.500 (Baldwin 1991).

[4] LA. CIV. CODE ANN. art. 2693 (West 1952).

[5] Most low-income tenants only use the warranty of habitability as a defense to a suit by the landlord. Few tenants have representation to bring affirmative actions against landlords for a violation of an act.

[6] ARK. CODE ANN. § 18-16-101 (Michie 1987) (misdemeanor).

[7] *Id.* § 18-16-101(b).

Each offense carries a potential fine of twenty-five dollars.[8]

The southern courts have been equally reluctant to follow national trends in landlord-tenant law. The Alabama Supreme Court rejected an implied warranty of habitability as recently as last year, stating that a covenant to repair would not be implied.[9] In 1990, the Arkansas Supreme Court also refused to recognize an implied warranty.[10] Prior to the legislature's action in 1991, the Mississippi Supreme Court refused to recognize the warranty as recently as 1982.[11]

Last year, the Mississippi legislature broke this pattern and ended its historical refusal to pass any landlord-tenant legislation. After fourteen successive years in which proposed bills died,[12] usually with little signs of life, House Bill Number 293 finally cleared the house. The Bill cleared the Senate by a vote of forty-eight to four.[13] The ease with which the bill passed surprised even its backers. Reactions to its provisions were varied. The contents of the new Act elated some proponents and horrified others; and some long-time opponents of tenants' rights reckoned that the Act was a victory for landlords. The Residential Landlord and Tenant Act[14] is not the model that a tenants' rights advocate would draft; on the other hand, it sets out important basic reforms that provide the groundwork for a comprehensive landlord-tenant law. For example, the Act lengthens the time period for termination of a month-to-month tenancy, requires landlords to maintain a dwelling in the same condition throughout a lease and to comply with local codes, gives tenants a full range of remedies for landlord breach, and prohibits landlord retaliatory action. For these reasons alone, its passage is a cause for tenant celebration. The Act does omit some commonly enacted reforms — it does little to remedy security deposit abuse and does not address self-help eviction or the lack of a landlord obligation to mitigate damages upon tenant abandonment. In addition, some of the remedies contain time limitations that reduce their effectiveness. Other provisions are unclear as written and are open to several interpretations. Only time and the pronouncements of the Mississippi Supreme Court will reveal the actual effect of parts of the Act and the meaning of some of its provisions.

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[8] *Id.* Thus, landlords have the free legal assistance of the state in removing tenants, who are understandably reluctant to contest the case even when a valid defense exists. The possibility of criminal fines accruing daily while the parties contest the case is too daunting for most low-income renters. The Arkansas State Supreme Court upheld the statute in 1968 and again in 1989 as a legitimate exercise of the state's police power. *Id.; see, e.g.*, Duhon v. State, 774 S.W.2d, 830 (Ark. 1989); Poole v. State, 428 S.W.2d 628 (Ark. 1968).

[9] *See, e.g.*, Johnson v. Passmore, 581 So. 2d 830, 831 (Ala. 1991) (citing Murphy v. Hendrix, 500 So. 2d 8, 8 (Ala. 1986) for position that landlord is not liable in tort for injuries to tenant caused by defect in leased premises).

[10] *See* Stalter v. Akers, 798 S.W.2d 428, 430 (Ark. 1990) (landlord not compelled to repair leased premises without statute).

[11] *See, e.g.*, Cappaert v. Junker, 413 So. 2d 378, 380 (Miss. 1982) (lessor is not obligated to make repairs to leased premises).

[12] Until the last few years, the bills rarely made it out of their assigned committee, Judiciary A. In 1989, a landlord-tenant bill passed the House of Representatives for the first time. In 1990, a bill passed the House easily but died when a Joint Committee of the House and Senate failed to reach agreement on a compromise bill by deadline.

[13] JOURNAL OF THE SENATE OF THE STATE OF MISSISSIPPI REGULAR SESSION OF 1991 at 1067 (1991).

[14] MISS. CODE ANN. § 89-8-1 *et. seq.* (1991).

This article describes the basic provisions of the new Residential Landlord and Tenant Act, explains any resulting changes to existing Mississippi law, and compares the provisions to landlord-tenant law in other states and to the Uniform Residential Landlord and Tenant Act. The article includes a number of suggestions for revising the Act, and explains the reasons for the proposed revisions. Appended to this article is a copy of the new Act. Sections which would be affected by proposed revisions are underlined and following the current section the corresponding revision appears in italics.

MISSISSIPPI LANDLORD AND TENANT ACT

1. *Effective Date*

The Act states that it applies to "any rental agreement entered into after July 1, 1991, wherever made, for a dwelling unit located within this state."[15] Clearly, the Act covers leases made after July 1 between persons who have had no prior dealings as landlord and tenant. As to persons with a landlord-tenant relationship predating the Act, coverage is less clear. The existence of a new *rental agreement*, not a new landlord-tenant relationship, is what triggers application of the Act. It is entirely possible for persons with a landlord and tenant relationship predating the Act to enter into a new rental agreement after the Act's effective date. If they do, the Act applies.

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[15] *Id.* § 89-8-3(1).

Determining whether a landlord and tenant have entered a new rental agreement depends in part on the type of tenancy involved. Most residential tenants in Mississippi rent on the basis of a fixed-term tenancy, usually for a year, which automatically expires at the end of the period, or a month-to-month tenancy with no set ending date, which requires written notice of termination. When a fixed term lease expires and is explicitly renewed for another year, the landlord and tenant have entered into a new fixed-term tenancy, even if all terms other than the dates remain exactly the same.[16] In contrast, if a tenant remains after a fixed term lease expires, and the landlord accepts rent on a monthly basis without explicitly renewing the old lease or entering a new one, the ongoing relationship creates a new periodic tenancy which will run from month-to-month until terminated by notice.[17] In both instances, a new tenancy, and therefore a new rental agreement has been entered. The Act will apply even if the parties have been in a landlord-tenant relationship prior to July, 1991, so long as the new lease or month-to-month tenancy begins after that date. This is a fair result. The Act should not apply to a fixed term lease entered prior to the Act's effective date, since the landlord made the agreement on the basis of existing law and cannot change the terms to reflect new enactments.[18] Once the term expires and the landlord renews the relationship in some form, he is free to alter the agreement to reflect changes in the law.

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[16] This is the only construction possible, since the old agreement has automatically expired without notice. *See* MISS. CODE ANN. § 89-7-23 (1991); ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 2.8 (1980).

[17] *See, e.g.*, Mississippi Dep't of Pub. Welfare v. Howie, 449 So. 2d 772, 778 (Miss. 1984); Crechale & Polles, Inc. v. Smith, 295 So. 2d 275, 277 (Miss. 1974). Mississippi is in the majority of states in which a tenant holdover after a year lease creates a periodic tenancy. In some states, however, a landlord who accepts rent after a holdover creates a fixed term lease of the same length as the original term, but with a maximum of one year. *See* Security Life & Accident Ins. Co. v. United States, 357 F.2d 145, 148 (5th Cir. 1966) (implies lease renewal on same terms); Spiritwood Grain Co. v. Northern Pac. R.R., 179 F.2d 338, 342 (8th Cir. 1950) (creates year-to-year lease by implication of law that may be terminated at end of any year); Gladwell v. Holcomb, 54 N.E. 473, 474 (Ohio 1889) (landlord option to continue tenancy for another year).

Application of the Act presents a more difficult question in month-to-month tenancies predating July 1, 1991. Most courts construe a periodic tenancy as one continuous tenancy rather than a series of separate tenancies,[19] so that a law enacted after the tenancy began does not affect the terms of the agreement.[20] If the Mississippi courts follow the majority—and probably, the better view of periodic tenancies,—then the Act will not affect periodic tenancies begun prior to July 1, 1991. While this is the better interpretation based on the technical rules of leasing, it does not necessarily produce the most equitable result. In cases of month-to-month tenancies there is not the potential for surprise that exists where a landlord is bound by a year long lease. While technically, the landlord and tenant entered into the agreement prior to the effective date, the landlord could adjust the terms of the tenancy on seven days notice to reflect application of the new Act and thereby create a new tenancy subject to the provisions of the Act. A formalistic interpretation may have the unfortunate result of excluding a number of tenancies from coverage long after landlords have notice of the new Act[21] and an opportunity to make desired changes in rental agreements. Many tenants in Mississippi rent the same unit for years on a month-to-month basis. The statute could accomplish a better balance of interests if the Act applied to "fixed term leases entered after July 1, 1991, and periodic tenancies in the first period beginning after July 1."

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[18] One possible exception is if the original lease contained an automatic renewal clause that provided for renewal without tenant notice. Some courts have held that a tenant holdover under these circumstances is equivalent to an explicit renewal of the lease, in which the provisions of the old lease are the basis for the new tenancy. *See* Weber v. C & C Dry Goods Co., 69 S.W.2d 731, 734 (Ky. 1934) (effectuates original intention of parties evidenced by documents). If the renewal clause is not automatic and requires tenant notice, but the tenant holds over, and the landlord accepts rent, then the usual rules regarding holdover apply. *See* Carsten v. Eickhoff, 323 N.E.2d 664, 668 (Ind. Ct. App. 1975) (holdover created year-to-year tenancy); Electronic Sales Eng'rs, Inc. v. Urban Renewal and Community Dev. Agency, 477 S.W.2d 814, 816 (Ky. Ct. App. 1972) (holdover accompanied by payment and acceptance of rent is insufficient to renew original lease). If a tenant has the option of automatic renewal and the landlord does not have the option of altering the terms of the agreement, automatic renewal of a lease predating the effective date of the act should be considered a continuation of the old agreement.

[19] *See* Janofsky v. Garland, 109 P.2d 750, 752 (Cal. Ct. App. 1941) (month-to-month tenancy is a continuing relationship); Stamboulos v. McKee, 342 A.2d 529, 530 (N.J. Super. Ct. App. Div. 1975) (same). A few courts have held that a periodic tenancy is a series of successive separate tenancies. *See* Thompson v. Gin, 556 P.2d 17, 18 (Ariz. Ct. App. 1976) (month-to-month tenancy is not continuing right of possession but begins and ends every month); Hite v. Field, 462 A.2d 393, 396 (Conn. Super. Ct. 1982) (same). This approach is difficult to reconcile with the concept of a periodic tenancy which continues on the same terms unless one of the parties acts to end it. At least one court draws a distinction between periodic tenancies created by agreement of the parties, construed as continuous, and those created by operation of law as the result of a holdover, construed as separate new tenancies each month. *See, e.g.*, Gladwell v. Holcomb, 54 N.E. 473, 474 (Ohio 1899).

[20] Schoshinski, *supra* note 16, § 2.10, at 48.

The affect of rent increases alleviates this problem to some extent. When a landlord and tenant in a periodic tenancy agree to change a significant term of the original agreement, such as the amount of rent, the new agreement substitutes for the old and creates a new tenancy.[22] Thus, if a landlord in a month-to-month tenancy that began prior to July 1, 1991, raises the rent after that date, the Act applies from the effective date of the increase. Although most of the cases on substitution of a new agreement deal with rent increases, the reasoning would also apply to changes in other material terms of the lease.

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[21] Prior to the new Act, a month-to-month tenancy could be terminated on seven days written notice. This period still applies to residential tenancies not covered by the 1991 Act. MISS. CODE ANN. § 89-7-23 (1991). Thus, a landlord could alter any terms of the periodic tenancy, including rent, by giving seven days notice of termination under the old terms and an offer of tenancy under the new terms.

[22] The agreement for a tenancy at a higher rent is a "rental agreement . . . entered into after July 1." The steps necessary for a landlord to impose an enforceable rent increase is the subject of some dispute. Some courts have held that a notice of rent increase, without an accompanying notice that the old tenancy is terminated, is ineffective and the old tenancy continues at the lower rate. *See, e.g.*, Stewart v. Melnick, 613 P.2d 1336 (Haw. Ct. App. 1980). Other courts hold that the landlord's notice of a rent increase is an offer to create a new tenancy at the increased amount which the tenant can accept by words or conduct. *See, e.g.*, Robinette v. French, 724 S.W.2d 196, 197 (Ark. App. 1987). However, where the tenant acquiesces and pays the higher rent, the landlord and tenant create a new tenancy at the higher rent. The tenant's payment is an implied agreement to accept the landlord's offer of a new tenancy. *See, generally*, Schoshinski, *supra* note 16, § 2.14, at 59. In Williams v. Barlow, 38 So.2 d 914, 915 (Miss. 1949) (en banc), the court held a rent increase ineffective because the landlord did not terminate the tenancy, but merely gave notice of an increase. *Id.* at 916. In that case, the tenant refused to pay the increased amount. *Id.* Presumably, if the tenant had agreed, the tenancy would have been terminated by agreement and a new tenancy created.

2. *Scope*

The Mississippi Act contains several exclusions from coverage, most taken from the Uniform Residential Landlord and Tenant Act and similar acts in other states. For example, the Act does not cover residents of nursing homes, hospitals, dormitories, fraternity and sorority houses, and prisons.[23] The Act excludes rental agreements accompanied by contracts of purchase, as well as proprietary leases in cooperatives, occupancy through condominium ownership, and transient occupancy in hotels or motels.[24] Use of the term "transient" indicates that the Act covers roomers and boarders in single room occupancy hotels. The language tracks the Uniform Act,[25] which deviated from the common law treatment of lodgers as licensees rather than tenants.[26]

The primary departure from the Uniform Act coverage is the exclusion of "[o]ccupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes or when the occupant is performing agricultural labor for the owner and such premises are rented for less than fair rental value."[27] In other words, the Act excludes farm workers if their employer provides housing "free of charge" or for less than the going rate for that particular unit. This provision appears to be peculiar to Mississippi. At least two states also exclude farm labor from the operation of landlord-tenant statutes, but do not tie the exclusion to below market rate rentals.[28] In a number of states, all employer-provided housing is considered to create a license, not a lease, if the employer intends for occupancy to be incidental to and conditioned on the employment.[29] The Uniform Act has apparently adopted this interpretation, excluding from its coverages "occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises."[30]

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[23] MISS. CODE ANN. § 89-8-3(2)(a), (c) (1991).

[24] *Id.* § 89-8-3(b), (d), (e).

[25] URLTA, *supra* note 3, § 1.202(4).

[26] Some courts considered lodgers as licensees primarily because they do not have exclusive control over the unit as do most tenants. *See, e.g.*, Vicking Motor Lodge, Inc. v. American Tobacco Co., 237 So. 2d 632, 634 (Ala. 1970); Roberts v. Casey, 93 P.2d 654, 659 (Cal. App. Dep't Super. Ct. 1939); *see also* Goodell v. Morris Lansburgh & Assoc., 77 So. 2d 247, 248 (Fla. 1955) ("lease" created innkeeper/guest relationship rather than landlord/tenant relationship); Buck v. Del City Apartments, Inc., 431 P.2d 360, 363 (Okla. 1967) (lodger is business invitee).

[27] MISS. CODE ANN. § 89-8-3(2)(f) (1991).

[28] *See* OHIO REV. CODE ANN. § 5321.01(c)(6) (Anderson Supp. 1990); TENN. CODE ANN. § 66-28-102(c)(5) (1982).

The exact policy behind the Mississippi exclusion of agricultural labor is difficult to understand. It is not explained by the existence of an employment relationship; if that were the reason for the exclusion, the provision would logically apply to other employer providers of housing, such as apartment complexes that provide housing for managers and maintenance personnel. It is likely that the specific exemption resulted from concern that a warranty of habitability would harm very low-income tenants renting substandard housing for little or nothing. In previous years, legislators suggested that a repair rule would actually work to the detriment of very poor tenants in the delta farming region because farmers who provide housing free, or for extremely low rates, would either abandon the housing or pass on the repair costs in the form of rents their tenants could not afford.[31] There is merit to the argument that strict code enforcement can be counterproductive with respect to dilapidated housing rented at very low rates.[32] But this concern is not limited to dilapidated farm housing for employees. Some of the extremely substandard housing in the Delta is rented for little or nothing to non-employees, and some of the worst low-income housing in the state is housing within city limits which rents for little or nothing.[33]

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[29] *Cf.* Moreno v. Stahmann Farms, Inc., 693 F.2d 106, 108 (10th Cir. 1982) (when employee occupies house on employer's premises, relationship of landlord/tenant does not exist and employers have duty to provide employees with reasonably safe lodging); Eaton v. R.B. George Investments, Inc., 254 S.W.2d 189, 196 (Tex. Civ. App. 1951), (employee occupying house on employer's premises is not tenant), *rev'd on other grounds*, 260 S.W.2d 587 (Tex. 1953).

[30] URLTA, *supra* note 3, § 1.202(5). Several states specifically exclude employee housing from application of landlord and tenant acts. *See, e.g.*, KY. REV. STAT. ANN. § 383.535(5) (Baldwin 1991); VA. CODE ANN. § 55-248.5 (Michie Supp. 1991).

[31] Remarks of Sonny Meredith in hearing before Judiciary Committee meeting. Dan Davis, *Renters' Rights Bill Clears Committee*, CLARION-LEDGER, March 3, 1988, at 4B.

[32] *See infra* notes 53-55 and accompanying text.

Application of the exclusion may prove equally confusing. The Act excludes farm employee rentals if the landlord rents the dwelling below market rate.[34] Where the landlord employs the occupant of a dwelling, the rent given for the unit cannot be determined simply by asking whether the employer made a separate charge for rent and, if so, the amount of the charge. If the employer provided the unit as part of the employee's compensation rather than as a gift, then some portion of the employee's labor constitutes payment for the house.[35] The value of that labor is the rent paid for the unit. For example, proof may show that an employer pays some employees $1,000 a month and provides housing, and pays other non-housed employees doing similar work $1,200 a month. In that case, it would appear that the employee housed on the farm provides labor valued at $200 a month in return for the house. Accordingly, the Act would apply unless the fair market rental of the unit exceeds $200.[36]

The farm worker exemption is drawn too narrowly to serve as either an employee exception or as an attempt to prevent abandonment of very substandard housing. If the legislature is concerned with employer housing, it should consider which of the provisions of the Act are inappropriate and specifically exempt employer housing from those provisions. If the exception is aimed at preventing abandonment of substandard housing, a more direct approach would be to include in the Act a provision stating that the habitability provisions are inapplicable where a unit is rented at or below market value. The best approach, however, would be to simply leave decisions concerning enforcement of the Act to individual tenants and their attorneys. A tenant who is paying no rent is unlikely to bring suit against a landlord requesting extensive repairs unless the tenant has sufficient income to absorb an increase in rent.

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[33] "Sugar Ditch," one of the most notorious blocks of housing in Mississippi, was located in the city limits of Tunica, Mississippi. Sugar Ditch gained its name because residents, lacking plumbing and outhouses dumped raw sewage into an open ditch running through the area. It became the subject of national attention in 1985. Jesse Jackson and the *60 Minutes* news team were among the notables who put Sugar Ditch on the map. Ultimately, the state provided a block grant to raze the houses and helped procure funds for development of a housing complex intended to house the Sugar Ditch residents. LOWER MISS. DELTA DEV. COMM'N, INTERIM REPORT, BODY OF THE NATION, 19 (Oct. 16, 1989).

[34] MISS. CODE ANN. § 89-8-3(2)(f) (1991).

[35] The statute defines rent as "all payments to be made to the landlord under the rental agreement." MISS. CODE ANN. § 89-8-3(2)(f) (1991).

[36] As a practical matter, much farm housing is not suitable for warranty enforcement for the reasons discussed in the text. However, other portions of the act such as the retaliatory eviction and good faith provisions could be applicable to farm tenants. *See* text accompanying *infra* notes 106-116.

3. *Obligations Under the Act*

The heart of any landlord and tenant statute is the landlord's obligation to maintain and repair the premises. The Mississippi Statute places a duty on landlords to: (1) comply with the requirements of "applicable building and housing codes materially affecting health and safety;"[37] and (2) maintain the unit in substantially the same condition as at the beginning of the lease.[38] The obligation does not extend to problems caused by the tenant or his guests, or from the tenant's failure to meet his obligations under the Act.[39] With respect to the second obligation, (the maintenance obligation) the Act is a progressive step that goes beyond landlord obligations in most states. As to the first provision, (the habitability obligation) the Act is on its face similar to many state landlord and tenant laws, but may provide substantially less protection than most in practice.

a. *The Maintenance Obligation*

The Act requires landlords to repair whatever was in working condition at the beginning of the lease, regardless of the defect's impact on health and safety.[40] No other state statute or judicially created warranty of habitability includes such an obligation. Instead, other states focus only on requiring landlords to maintain "habitable" dwellings—those that are free of defects affecting health and safety.[41] The Mississippi maintenance obligation and the usual habitability obligation are grounded in different concerns. Landlords are required to provide tenants with habitable premises as a matter of public policy. The express agreement between the landlord and tenant has little to do with the warranty of habitability. In contrast, a requirement that landlords maintain a dwelling in the same condition throughout a lease is directly based on the rental agreement. When a landlord rents a dwelling for $500 that contains working appliances or amenities such as a dishwasher, doorbell, fireplace, or microwave oven, the agreed rent includes those items. It is reasonable to assume that the tenants intended to continue payment of that amount of rent only so long as the unit contained those amenities. Similarly, if a tenant rents a unit for $200 a month that contains a working stove, the tenant expects that for that amount of rent the stove will continue to work. The Mississippi Act permits these tenants to obtain repair, regardless of whether the broken dishwasher or doorbell materially affects health and safety.

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[37] MISS. CODE ANN. § 89-8-23(1)(a) (1991).

[38] *Id.* § 89-8-23(1)(b).

[39] *Id.* § 89-8-23(2), (4).

[40] *Id.* § 89-8-23(1)(b).

[41] *See, e.g.*, Berzito v. Gambino, 308 A.2d 17, 22 (N.J. 1973); *see also*, HAW. REV. STAT. § 521-42(a)(3) (1985) (landlord covenants, *inter alia*, to make all repairs and ar-

Interestingly, many courts, in creating warranties of habitability, have looked to contract law to justify the change in landlord obligations.[42] For example, in the famous *Javins* case, the

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rangements necessary to put and keep premises in habitable condition); Smith v. David, 176 Cal. Rptr. 112, 115 (Cal. Ct. App. 1981) (habitability requires substantial compliance with code standards which "materially affect health and safety"); Jack Spring, Inc. v. Little, 280 N.E.2d 208, 217 (Ill. 1972) (covenant required compliance with applicable housing code provisions); Mease v. Fox, 200 N.W.2d 791, 796-97 (Iowa 1972) (eight factors court considers in determining breach of habitability); Detling v. Edelbrock, 671 S.W.2d 265, 270 (Mo. 1984) (en banc) (habitability measured by community standard; duty to keep premises safe and sanitary); *cf.* URLTA, *supra* note 3, at § 2.104(a) (requires landlord to comply with housing and building codes, keep premises in "fit and habitable" condition, maintain common areas and trash disposal, and supply adequate living conditions).

[42] *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074-75 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). Contract law has consistently supported the theory that, absent any special agreement, a merchant must warrant that his goods are fit for ordinary use and are of "reasonable average quality." *Id.* at 1075. Similarly, in a lease contract, when a tenant purchases shelter from a landlord, he must rely on the "skill and bona fides" of his landlord to decide whether the premises are reasonably fit for the designed purpose. *Id.* Because of the inequality of bargaining power between the landlord and tenant, and the increasing shortage of adequate housing, the court stressed protection of tenant's rights under an implied contract theory. *Id.* at 1079-80. Therefore, a tenant's obligation to pay rent is dependent upon landlord's performance of his obliga-

court stated that, when a tenant rents a dwelling, he contracts for "a well-known package of goods and services—a habitable dwelling."[43] In fact, it is probably unlikely that a tenant who rents a dilapidated two bedroom building for one $150 a month expects the landlord to upgrade the dwelling to a habitable condition. The tenant may expect, however, that if the house has a working lock on the door at the outset of the lease the landlord will replace it if it breaks without fault of the tenant. Public policy rather than a theory of implied contract is the logical basis for a warranty of habitability. On the other hand, an obligation to maintain the unit in the same condition throughout the lease, independent of standards of habitability, is well-grounded in contract law. In requiring repair, the court is simply enforcing the contract of the parties.[44]

b. The Habitability Obligation

In contrast to the maintenance obligation, the Act imposes a poorly crafted habitability obligation on landlords which will result in inconsistent enforcement cross the state. The Act requires landlords to "comply with the requirements of applicable building and housing codes materially affecting health and safety."[45] In a number of states, housing codes provide the standard to measure the habitability of dwellings;[46] in other states, the courts use a general standard of "decent, safe and sanitary"

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tions, including warranty to maintain premises in habitable condition. *Id.* at 1082; *see* Hawkinson v. Johnston, 122 F.2d 724, 730 (8th Cir. 1941) (total breach of lease contract by anticipatory repudiation recognized under Missouri lease law), *cert. denied*, 314 U.S. 694 (1941); Medico-Dental Bldg. Co. v. Horton & Converse, 132 P.2d 457, 462 (Cal. 1942) (rent payment and lessor's restrictive covenant found "mutually dependent"); Marini v. Ireland, 265 A.2d 526, 534 (N.J. 1970) (implied covenant to provide habitable house mutually dependent on covenant to pay rent).

[43] *Javins*, 428 F.2d at 1081.

[44] *See infra* notes 85-87 and accompanying text.

[45] Miss. Code Ann. § 89-8-23(1)(a) (1991).

[46] *Javins*, 428 F.2d at 1081; *see* Morford v. Lensey Corp., 442 N.E.2d 933, 936 (Ill. App. Ct. 1982) (both oral and written residential leases include implied warranty of habitability, premised upon provisions of applicable building and housing codes); Breezewood Mgmt. Co. v. Maltbie, 411 N.E.2d 670, 674 (Ind. Ct. App. 1980) (implied warranty of habitability breached when landlord violated applicable housing code provision).

to evaluate the condition of dwellings.[47] The Mississippi legislature has chosen the first method; the problem is that housing codes do not cover the entire state. Some cities and towns have adopted the Southern Standard Housing Code,[48] which imposes quite rigorous standards for residential housing, while others have adopted only the Southern Standard Building Code,[49] which simply sets out construction standards. Therefore, a landlord in one town may have to comply with strict requirements, regardless of the rental price of his housing, while a landlord in a nearby small town may avoid any general repair responsibility except with respect to items working at the outset of the lease.

General obligations to repair, or warranties of habitability, are imposed as a matter of public policy; courts, or legislatures, have determined that residential tenants should be afforded a minimum standard of habitability in their homes. The policy applies equally to all tenants, and should not be tied to the chance decision of a municipality to enact a housing code. The better approach to general maintenance obligations in a state checkerboarded with codes is a general standard of minimum habitability with reference to available codes as a guideline.

The problem of inconsistent coverage may have been remedied by a recent Mississippi Supreme Court decision. In *O'Cain v. Freeman & Sons, Inc.*,[50] a majority of the court appears to have endorsed a general warranty of habitability as a supplement to the statutory obligation to comply with codes. In that case, a landlord was sued by one of his tenants for emotional distress as a result of her roommate's rape. She charged that the rape was partly caused by the landlord's negligence in failing to provide properly secured sliding glass doors. The court's opinion, written by Justice Lee, treated the case as a straightforward negligence action. However, five justices concurred in a separate opinion by Justice Sullivan, which states, "I can no longer endorse the application of *caveat emptor* to residential lease agreements."[51] "[T]he bare minimum standard for an implied warranty of habitability should require a landlord to provide reasonably safe premises at the inception of a lease, and to exercise reasonable care to repair dangerous defective conditions."[52] The court noted that the new landlord-tenant act does not expressly impose such a duty on landlords but does so at least implicitly.[53] It appears from this case that the court will now recognize an implied warranty in addition to the duty to comply with housing codes. If that is so, then landlords across the state will be required to provide habitable residential dwellings even in absence of local codes. Presumably, local codes will provide the standard if they are available. If they are not, the court will look to general standards of habitability.

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[47] Lemle v. Breeden, 462 P.2d 470, 476 (Haw. 1969); *see* Glasoe v. Trinkle, 479 N.E.2d 915, 920 (Ill. 1985) (breach of warranty is question of fact to be determined on a case-by-case basis); Detling v. Edelbrock, 671 S.W.2d 265, 270 (Mo. 1984) (en banc) (existence of material breach will be a question of fact based on individual circumstances of each case).

[48] *See generally* SOUTHERN BLDG. CODE CONGRESS INTERNATIONAL, INC., STANDARD HOUSING CODE CH. 3 (1988) [HEREINAFTER STANDARD HOUSING CODE].

[49] *See generally* Southern Standard Building Code Congress International, Inc., Standard Building Code.

[50] No. 07-59446 (Dec. 18, 1991).

The potential adverse effect of a general habitability obligation on very poor tenants has been a persistent theme in the long struggle to pass landlord-tenant laws in Mississippi. The argument is not unique to this state; opponents of the warranty of habitability routinely argue that the warranty actually harms low income renters by increasing rents and decreasing the stock of available housing.[54] While the argument may be questionable in other settings, it has undeniable merit in portions of Mississippi.

According to the 1990 Census, almost twenty percent of renters in rural Mississippi pay no cash rent at all.[55] An even greater number pay less than $100 a month.[56] Many of these tenants live in barely habitable houses that were never intended to be "habitable" according to today's standards. Estimates suggest that in some parts of the state almost half the rental housing is dilapidated beyond repair.[57] In those areas, the number of persons living well below the poverty level is likely to exceed those above it. If owners of this housing are forced to weatherize, plumb, heat, and repair these tenant houses, they will either begin charging rent to cover the costs or terminate the occupancy. The latter is more likely; there is no economic incentive to repair and continue renting. Landlords are well aware that most potential renters for the housing are too poor to be a good source of rental payments without deep subsidy. And there is no reason to preserve the stock, because it has little or no residual value. In fact, the costs of bringing a house up to code standards may exceed the value of the house itself. Given the choice, the owners will simply let the housing fall or destroy it. This is not a result to choose unless there is alternative housing available. And in most areas, there is not.

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[51] *O'Cain*, No. 07-59446, slip op. at 3 (Sullivan, J., concurring).

[52] *Id.* slip op. at 4 (Sullivan, J., concurring).

[53] *Id.* (Sullivan, J., concurring).

[54] *See* Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 889-93 (1975) (warranty reduces funds available for maintenance and therefore shortens building life when landlord upgrades without rent increase); *cf.* Duncan Kennedy, *The Effect of Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U.L. REV. 485, 499 (1987) (responding to the argument).

[55] *See* MISSISSIPPI HOME CORP., STATE OF MISSISSIPPI COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY 4 (1991).

[56] *Id.*

The legislature chose to address this problem (or so it appears) by excluding farm employee housing from the Act. But, as explained previously, that exclusion does not cover all of the housing described above. Very low income tenants and their attorneys must, therefore, carefully weight the possible outcomes when contemplating an action under the habitability provision rather than the repair provision of the Act. The decision to pursue an action should take into account the tenant's income, the current rent, the cost of repairs, and the likelihood of a rent increase to recoup the costs.

c. *Waiver of the Landlord's Obligation*

The Act provides that a landlord and tenant may agree that the tenant will assume the landlord's repair obligations if they so agree in good faith. This is in sharp contrast to the Uniform Act, which states that the parties may not agree to waive rights or remedies provided by the Act, and which allows tenants to recover actual damages, three months' rent, and attorney's fees if a landlord deliberately uses a prohibited provision in a rental agreement.[58] Even in the absence of a statutory prohibition on waiver, most courts have held that a waiver of the landlord's obligations is not permissible, for the same public policy reasons behind imposition of the warranty—unequal bargaining power, shortage of housing, and the expectations of a minimally habitable dwelling.[59]

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[57] LOWER MISS. DELTA DEV. COMM'N, THE DELTA INITIATIVE: REALIZING THE DREAM FULFILLING THE POTENTIAL 52 (David W. Brown ed., 1990).

The Restatement (Second) of Property permits waiver unless it is unconscionable, citing factors to be considered in determining unconscionability such as the ability of the tenant to make needed repairs and the equality of bargaining power.[60]

It remains to be seen what the Mississippi Supreme Court will do with the notion of a "good faith" waiver. Reviewing the approach of courts and legislatures to waiver, it seems likely that the court would invalidate standard form waivers of which the tenant was unaware, or which involved unequal bargaining power.[61] Since the Mississippi Act defines good faith by objective standards based on community notions of fair dealing, rather than simply "honesty in fact,"[62] the court should ask what the community expects of a landlord. If the expectation is that he will maintain the unit in the same condition as at the outset of the lease, then as to the maintenance obligation, good faith would require some consideration, such as a reduction in rent for tenant assumption of those obligations. As to the habitability obligation, if the community expects a landlord to maintain a unit in a condition commensurate with the rent charged, then a waiver should be considered in good faith only if the landlord rents the unit for less than would be paid for a similar unit in code compliance. Practically, the good faith waiver provision may act as a mechanism for up-front resolution of the difficult issues raised by across the board maintenance requirements for landlords who rent substandard houses for little or nothing.

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[58] URLTA, *supra* note 3, § 1.403.

[59] *See* Green v. Superior Ct., 517 P.2d 1168, 1175 (Cal. 1974) (public policy prohibits landlords from using their superior bargaining power to negate warranty of habitability); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973) (lease provisions cannot waive implied warranty based on sanitary code and health regulations); Hilder v. Saint Peter, 478 A.2d 202, 208 (Vt. 1984) (landlord and tenant cannot waive implied warranty in written lease or oral agreement); *cf.* Longenecker v. Hardin, 264 N.E.2d 878, 880 (Ill. 1970) (lease provision stating that tenant examined premises and acknowledged its suitable condition does not preclude defense of illegal contract). *But see* Middletown Plaza Assoc. v. Dora Dale of Middletown, Inc., 621 F. Supp. 1163, 1166 (D. Conn. 1985) (waiver of tenants rights to assert counterclaim in commercial leases found enforceable under New York law).

[60] RESTATEMENT (SECOND) OF PROPERTY § 5.6 (Supp. 1990).

[61] Even those courts permitting waivers have emphasized the importance of a knowing and intelligent waiver. *See* Mease v. Fox, 200 N.E.2d 791, 797 (Iowa 1972) (tenant's voluntary, knowing, and intelligent waiver of implied warranty considered one of factors relevant in testing effect and materiality of landlords breach); Berzito v. Gambino, 308 A.2d 17, 23-24 (N.J. 1973) (despite possibility of waiver, court found no waiver occurred where tenant remained in possession and paid rent despite landlord's failure to repair defects and where there was a scarcity of substitute low income housing existed).

[62] MISS. CODE ANN. § 89-8-7(1)(c) (1991).

While there are certainly situations where a knowing waiver can achieve a fair restructuring of landlord-tenant obligations, the potential for abuse is great. This potential could be minimized by amending the statute 1) to permit waiver only by a separate, signed writing, 2) to prohibit waiver of the maintenance obligation unless there is a stated fair consideration (such as a specific rent reduction), and 3) to prohibit waiver of the habitability obligation only where the unit is rented at or below market value in its current condition.

Section 89-8-5(b) prohibits a provision in the rental agreement which exculpates or limits the landlord's liability for "willful misconduct."[63] Under current Mississippi law, a landlord cannot exculpate himself from tort liability for ordinary negligence connected with a breach of one of the common law duties to repair.[64] For example, if a landlord fails to repair a defect in a common area, a lease provision exculpating the landlord from damages is ineffective.

The provision cited above sets a much more lenient standard. Apparently, a lease provision exculpating a landlord from ordinary negligence, as opposed to "willful" action, is not prohibited by the Act. It is quite possible, however, that the Mississippi courts will hold nonetheless that an exculpatory clause is unenforceable as against public policy.

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[63] Miss. Code Ann. § 89-8-5(b) (1990).

[64] In Cappaert v. Janker, 413 So. 2d 378, 379 (Miss. 1982), a tenant sued a landlord for injuries sustained on a negligently maintained common stairway. The court held in that case that a landlord could not immunize himself from tort liability for negligence through an exculpatory clause. Such a clause was held to be void as against public policy. *Id.* at 382.

d. Tenant's Enforcement of the Act

If the landlord materially breaches the rental agreement or obligations under the Act, the tenant has several options. First, the tenant may give written notice of the breach and inform the landlord that if the breach is not remedied within a reasonable time, the rental agreement will be terminated in thirty days.[65] The Act states that the "reasonable time" for repairs cannot exceed thirty days.[66] If the landlord repairs within the time set, termination is no longer possible.[67] However, if the same breach recurs within six months, the tenant may terminate on a fourteen day notice.[68] The tenant need not meet the thirty day notice requirement for termination if the defect is a "substantial violation" that "materially affects health and safety."[69] Second, if the landlord has not repaired within thirty days of a tenant notice, the tenant may exercise the repair and deduct remedy discussed in the following section and make the repairs himself.[70]

The Act also states that if a landlord materially breaches the lease or the Act, the tenant may "resort to any other remedy at law or in equity."[71] The typical contract remedies available for a breach of the warranty are an affirmative action for damages,[72] specific performance,[73] and the right to offset rent or counterclaim for damages in an action by the landlord for rent or eviction for non-payment of rent.[74] Presumably, the tenant has this full range of actions available for landlord breach.

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[65] Miss. Code Ann. § 89-8-13(3).

[66] *Id.*

[67] *Id.* § 89-8-13(4).

[68] *Id.*

[69] *Id.* § 89-8-19(4).

[70] Miss. Code Ann. § 89-8-15 (1991).

[71] *Id.* § 89-8-13(2).

[72] *See, e.g.*, Cazares v. Ortiz, 168 Cal. Rptr. 108, 110 (1980) (legislation implying warranty construed to permit affirmative action for damages); Miller v. C.W. Myers Trading Post, Inc., 355 S.E.2d 189, 192-93 (N.C. Ct. App. 1987) (affirmative action for recovery of rent paid allowed based upon landlords breach of implied warranty).

[73] *See, e.g.*, South Austin Realty Ass'n v. Sombright, 361 N.E.2d 795, 798 (Ill. App. Ct. 1977) (trial court erred in dismissing tenants counterclaim seeking injunction preventing landlord from evicting them and requiring him to repair property to meet minimum housing standards); Clore v. Fredman, 319 N.E.2d 18, 21 (Ill. 1974) (public policy, evidenced by statute, forbids landlord to terminate or refuse to renew lease be-

The statute's thirty day waiting period prior to the tenant's exercise of termination and repairs and deduct remedies is more than twice the length of the Uniform Act's suggested fourteen day period.[75] Although the termination provision states that the repairs must occur with a *reasonable time* not to exceed thirty days,[76] a tenant cannot know in advance what a court may deem a reasonable time period. And the repair and deduct remedy definitely requires that the tenant wait thirty days before exercising that right.[77] However, in the case of real emergencies such as a failure to provide heat, water, or other utilities, the tenant has the option of bringing immediate suit for injunctive relief.[78]

The Uniform Act goes into much more detailed remedies for breach. In addition to the general requirement that landlords repair within fourteen days or "as promptly as conditions require in case of emergency,"[79] there is a special provision for failure to provide utilities. If a landlord fails to provide heat, water, utilities, or other essential services, the tenant may procure them immediately and deduct the cost from rent, or obtain substitute housing, withhold rent, and recover from the landlord the cost of substitute housing and reasonable attorneys' fees.[80]

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cause tenant complained to authorities). *But see, e.g.*, Bartley v. Walentas, 434 N.Y.S.2d 379, 382 (N.Y. App. Div. 1980) (injunction requiring landlord to repair not appropriate remedy where local rent laws provide for "administrative machinery" to enforce agency orders and police violations).

[74] *See, e.g.*, Hines v. John B. Sharkey Co., 449 A.2d 1092, 1095 (D.C. 1982) (tenants counterclaim for rent abatement based on housing code violations, may include period for which landlord claims nonpayment of rent and prior periods of tenancy); Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981, 983 (Mass. 1979) (in eviction action, tenant allowed to counterclaim based on breach of implied warranty of habitability). *But see, e.g.*, Lindsey v. Normet, 405 U.S. 56, 58 (1971) (constitution has not federalized substantive landlord-tenant law, no requirement that tenants be permitted to counterclaim).

[75] URLTA, *supra* note 3, § 4.103.

[76] MISS. CODE ANN. § 89-8-13(3) (1991).

[77] *Id.* § 89-8-15.

[78] *Id.* § 89-8-13.

[79] URLTA, *supra* note 3, § 4.103.

[80] *Id.* § 4.101.

(1) Repair and deduct

The repair and deduct remedy is a useful tenant remedy for minor problems. If the landlord fails to repair after thirty days, the tenant may repair the defect and bill the landlord, with the following limitations: the tenant may only use this remedy twice a year; any one set of repairs must not exceed one month's rent; and the cost must not exceed the usual charge in the area.[81] In addition, a tenant may use this remedy only if she is current in her rent and has fulfilled her obligations under the Act.[82] The landlord must reimburse the tenant within forty-five days after billing. As an alternative, the tenant may offset rent by the amount of the repairs.[83]

(2) Calculation of Damages

Courts have used several measures to calculate damages for breach of the warranty of habitability. The two most commonly used measures are variations of the contract measure of damages. In the first, the tenant receives the difference in the fair market value of the house "as is" and the fair market value of the house "as warranted," in other words, the value as if the house had been in a habitable condition.[84] This is a traditional measure of contract damages, and is calculated to give the party the benefit of his bargain. For example, assume that a tenant has rented a house for $200 a month. This house is in bad condition and is actually worth only $150 a month. If the house met all of the local code requirements, it would probably rent for $350 a month. The first measure of damages would give this tenant $200 a month damages, the difference between the value of the house as is ($150) and the value if it had met code standards ($350). If the landlord must pay the tenant $200 a month damages, while the tenant is paying $200 a month rent, the effect is that the tenant pays nothing for a house that is actually worth $150 a month. The result occurs because the damages formula is based on the notion that the tenant actually bargained for and expected to get, and the landlord agreed to give, a habitable house. If that were actually the case, the tenant would have made an excellent deal ($150 below market), and the formula would recognize his shrewdness by giving him the benefit of his bargain.

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[81] MISS. CODE ANN. § 89-8-15 (1991).

[82] *Id.*

[83] *Id.*

[84] *See, e.g.*, Glasoe v. Trinkle, 479 N.E.2d 915, 921-22 (Ill. 1985) ("difference in value" approach involves taking difference between fair rental value of the premises if they had been as warranted and the fair value of premises in defective condition); Miller v. C.W. Meyers Trading Post, Inc., 355 S.E.2d 189, 194 (N.C. Ct. App. 1987) (rent abatement "calculated as the difference between fair rental value of the premises as warranted . . . and the fair rental value of the premises in their unit condition"); Hilder v. St. Peter, 478 A.2d 202, 209 (Vt. 1984) (measure of damages computed as difference between value of dwelling as warranted and nature of dwelling as it exists in its defective condition); *see also* Roeder v. Nolan, 321 N.W.2d 1, 5 (Iowa 1982) (lessee is competent to testify as to fair rental value of premises in its deficient condition).

Application of this traditional contract measure of damages to substandard housing continues the confusion the *Javins* court began when it grounded the warranty of habitability in contract theory.[85] When a tenant rents a substandard house worth $150 for $200, the tenant is not bargaining for a $350 house but for a $150 house, and in fact has made a bad bargain by paying $200 for it. Courts impose warranty obligations on landlords of substandard housing as a matter of public policy, not contract. Because of this, the more realistic damages formula is the difference in contract rent and fair market value as is.[86] Applying this formula to the above example, the court would find damages of $50, the difference in the contract rent of $200 and the actual value of $150. In effect, the court requires the tenant to pay only what the house is worth ($150) by giving her a fifty dollar rebate. In other words, as a matter of public policy, and not because of the expectations of the parties, a landlord is prohibited from charging more for dilapidated housing than it is worth.

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[85] *See supra* notes 42-43 and accompanying text.

[86] *See, e.g.*, Park West Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1295 (N.Y. 1979) (measure of damages for breach of warranty of inhabitability under statute "is difference between the fair market rented value of the premises as measured by rent reserved under lease and fair market rental value during period of breach), *cert. denied* 444 U.S. 992 (1979); Lane v. Kelly, 643 P.2d 1375, 1377 (Or. App. 1982) (same); Waldon v. Williams, 760 S.W.2d 833, 835 (Tex. Ct. App. 1988) (difference between contract rental and rental value of premises as is constitutes damages in case of a breach of landlord's statutory duty to repair); *see also* Samuel B. Abbott, *Housing Policy, Codes, and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 21 (1976) (discussion of types of measure of damages for breach of implied warranty and problems associated with each); Walter W. Krieger & Michael A. Shurn, *Landlord-Tenant Law: Indiana at the Crossroads*, 10 IND. L. REV 591, 616 (1977) (discussion of damage measurements and equitable results of applying the difference between fair market value as is and contract rent).

This reasoning does not apply to substandard housing when the landlord has breached the obligation to maintain in the same condition rather than the habitability obligation. Requiring a landlord to repair whatever was working at the outset of the lease is an obligation based on contract. If a low-income tenant pays $200 for an admittedly substandard house with a working stove, she is entitled to the benefit of her bargain, which is a house with a working stove. The traditional contract measure of damages would be appropriate here; it may be difficult, however, to determine the difference in market value with and without a working stove. Schoshinski suggests that courts often use a percentage reduction in use formula for damages in such situations.[87] If, for example, the court feels that the tenant loses twenty-five percent use of the house by not being able to prepare food for her family, the tenant's monthly rent would be reduced by fifty dollars for each month that the stove was not working.

Some courts have held that a landlord's breach of the warranty permits a tenant to withhold rent completely until a court has determined the amount of rent that a tenant owes for that period.[88] If the landlord brings an eviction action based on nonpayment of rent for four months, and the court determines that the tenant only owed half the rent, the tenant will not be evicted if he pays the amount actually owed.[89] In other states, a writ of eviction will issue if the amount owed by the tenant exceeds the amount of the offset.[90] In Mississippi, the tenant always has the option of stopping an eviction by paying the amount actually in arrears (plus costs) up until the eviction warrant issues.[91] Presumably, if a tenant offers an amount equal to the court's judgment, no warrant may issue.

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[87] *See* Schoshinski, *supra* note 16, § 3.25. The percentage of the tenants reduction in use formula measures the percentage of tenants reduction in use caused by the breach, and then offsets the rent by the percentage. *See* Housing Authority v. Melvin, 507 N.E.2d 1289, 1292 (Ill. 1987) (since rent paid by public housing tenant bore no relation to fair rental value of premises, "percentage reduction in use" method appropriate in determining damages for breach of warranty of habitability); *Glasoe*, 479 N.E.2d at 921 ("there may be cases in which the 'percentage reduction in use approach' . . . may be appropriate"); McKenna v. Begin, 362 N.E.2d 548, 552 (Mass. App. Ct. 1977) (court adopted percentage reduction of rent approach to fashion measure of damages which more closely reflected tenant's actual damage).

[88] *Schoshinski*, *supra* note 16, § 3.22 n.10.

[89] *Id.*

(3) Specific Performance

The contract remedy of specific performance is generally available for landlord breach of the warranty of habitability when the remedy at law is inadequate. Where the cost of the repair needed exceeds the amount authorized for the repair and deduct remedy, it would seem that the remedy at law is clearly inadequate. The most difficult question connected with specific performance is whether a landlord is permitted to raise the rent to cover the costs of the repair. In a fixed term lease with no provision for rent adjustments, a landlord cannot increase rents during the term to offset the cost of repairs. However, in a month-to-month tenancy, he can potentially increase the rent by giving a thirty day notice.

The Act prohibits a landlord from increasing rents in retaliation for a tenant's exercise of rights under the Act.[92] It is difficult to determine at what point a rent increase goes beyond reasonable business judgment and becomes retaliatory. If a tenant renting a substandard house for $100 a month obtains injunctive relief requiring a landlord to expend $5000 to meet code requirements, and the rental value is increased to $250 a month, the landlord is probably entitled to receive fair market rental for the unit. On the other hand, where a tenant requests repair of an item working at the outset of the lease, a rent increase is suspect unless the problem involves large and unforeseeable expenditures. And any increase over market rental value following a tenant request for repairs should be probably considered retaliatory.

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[90] *See, e.g.*, Jack Spring, Inc. v. Little, 280 N.E.2d 208, 213 (Ill. 1972) (if landlord breach equals or exceeds rent owed by tenant, no rent owed and landlord cannot regain possession); Foisy v. Wyman, 515 P.2d 160 (en banc) (Wash. 1973) (landlord's eviction action sustained where tenant forgoes paying any rent based on partial breach of warranty of habitability).

[91] MISS. CODE ANN. § 89-7-45 (1991).

[92] *Id.* § 89-8-17.

e. Tenants Obligations

Section 89-8-25, subsections (a) through (g) of the new Act premises that tenants must use appliances reasonably, keep the premises and fixtures clean, dispose of trash, and refrain from damaging the property or disturbing others.[93] Subsection (h) states that the tenant also must "to the extent of his legal obligation," maintain the unit in the same condition as at the beginning of the lease and comply with applicable housing codes.[94] This last section is an odd provision, and appears at first glance to impose on the tenant a maintenance and habitability obligation identical to the landlords. However, the words "to the extent of his legal obligation" essentially render the provision redundant. The only "legal obligations" a tenant has with respect to maintenance of the unit, at least under the Southern Standard Housing Code, are those already listed in subsection (a) through (g).[95] The provision is meaningless, and should be omitted from the Act because of its potential for confusion.

f. Security Deposits

One of the major causes of security deposit abuse by landlords is the lack of any incentive to return the deposit. In the absence of security deposit protections, such as multiple damages and attorneys' fees, a landlord knows that the tenant is unlikely to bring suit to recover a deposit; the expense usually outweighs the return. Even if the tenant does sue, and the landlord loses, the landlord will probably only have to pay the deposit and costs. The gamble usually pays off.

In recent years, courts have enacted a wide range of provisions designed to prevent security deposit abuse. Probably the most common provisions are statutes which set out specific procedures that a landlord must follow in order to keep a deposit, such as itemizing the damages, and providing notice within a certain number of days.[96] The penalties imposed on a landlord who violates the statutes include forfeiture of the deposit,[97] costs and attorney's fees,[98] and punitive damages for bad faith violations.[99] Some states limit the amount of a security deposit to one or two months rent.[100] Some states require the landlord to place the deposit in a separate account to be held in trust. In some instances the landlord must pay a fixed rate of interest on the deposit.[101]

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[93] *Id.*

[94] *Id.*

[95] *See* STANDARD HOUSING CODE, *supra* note 48.

Compared with many security deposit laws, the Mississippi Act is quite weak. It requires the landlord to provide the tenant with a written itemization of the reasons for retention, and to return any refundable portion within forty-five days of the lease termination and tenant request for a return of the security deposit.[102] Upon a failure to return the deposit the tenant can recover actual damages (probably the deposit) and a *maximum* of $200.[103] This provision actually decreases the tenant's right under the common law as it existed in the state, since it appears to exclude the possibility of punitive damages exceeding $200.

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[96] *See, e.g.*, CONN. GEN. STAT. ANN. § 47a-21(d) (West Supp. 1991) (30 days unless landlord does not have forwarding address); DEL. CODE ANN. tit. 25, § 5511(e) (1974) (15 days); LA. REV. STAT. ANN. § 9.3251 (West 1991) (30 days); NEB. REV. STAT. § 76-1416(2) (1990) (within 14 days of demand by tenant with mailing address).

[97] *See, e.g.*, COLO. REV. STAT. ANN. § 38-12-103(2) (West 1973) (forfeiture if failure to comply with 30 day limit); GA. CODE ANN. § 44-7-35 (1991) (30 days); ME. REV. STAT. ANN. tit. 14 § 6033 (West 1980) (also 30 days); MICH. COMP. LAWS ANN. § 554.613 (West 1979) (complex landlord procedures).

[98] *See, e.g.*, GA. CODE ANN. § 44-7-35 (West 1979) (reasonable attorney's fees unless good faith error); LA. REV. STAT. ANN. § 9.3253 (West 1991) (left to discretion of court); NEB. REV. STAT. § 87-1416(3) (1990) (costs and reasonable attorney's fees); N.J. STAT. ANN. § 46:8-21.1 (West 1989) (costs and, in court's discretion, attorney's fees); WASH. REV. CODE ANN. § 59.18.280 (West 1990) (costs and reasonable attorney's fees).

[99] *See, e.g.*, ARK. CODE ANN. § 18-16-306 (Michie 1987) (treble damages if wrongfully withheld); GA. CODE ANN. § 44-7-35 (1991) (triple amount withheld unless good faith error); MICH. COMP. LAWS ANN. § 554.613(2) (West 1988) (double amount of security deposit); WASH. REV. CODE ANN. § 59.18.280 (1990) (up to twice security deposit).

[100] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1321(A) (1956) (security limited to one and one half months rent); ARK. CODE ANN. § 18-16-304 (Michie 1987) (two months rent); DEL. CODE ANN. tit. 25, § 5511(a) (1989) (one month's rent on contracts for one year or more); MD. CODE ANN., REAL PROP. § 8-203(b)(1) (1988) (two month's rent or $50, whichever is greater).

[101] *See, e.g.*, DEL. CODE ANN. tit. 25 § 5511(b) (1974) (escrow); GA. CODE ANN. § 44-7-31 (1991) (escrow or in trust); N.J. STAT. ANN. § 46:8-19 (West 1989) (hold in trust and pay interest); WASH. REV. CODE ANN. § 59.18.270 (West 1990) (hold in trust).

[102] MISS. CODE ANN. § 89-8-21 (1991).

[103] *Id.* § 89-8-21(4).

One provision of the Act, however, could provide assistance to tenants. The Act states that any security deposit "shall be held by the landlord for the tenant who is a party to such agreement."[104] Arguably, this section imposes upon the landlord the duties of a bailee with respect to the deposit; that is, the deposit is no longer to be viewed as creating a debt from the landlord to the tenant. In that case, landlords can no longer follow the usual practice of spending the deposit and making up any reimbursement at the end of the lease. This would be an excellent provision, if it contained a workable enforcement mechanism, because landlords are much more inclined to return a deposit that is available from funds set aside for that purpose rather than reimburse a tenant from his own general funds. The provision does not explicitly require, as some statutes do, that the tenant receive interest on the deposit, nor that the funds be segregated in an account and the tenant given the account number.[105] However, it would seem to follow from the nature of a bailment that funds could not be spent by the landlord.[106]

The security deposit provision of the Act provides little if any protection for tenants, and should be amended to require segregation of the deposit, and damages sufficient to deter unjustified retention of security deposits, including attorney's fees.

g. *Limitations on Eviction*

Although there are a number of existing limitations on a landlord's right to terminate a tenancy, the general common law rule is that a landlord may terminate a month-to-month tenancy by proper notice, or refuse to renew an ongoing lease, for any reason.[107] The majority of states have adopted some form of tenant protection from landlord retaliatory eviction as a necessary corollary of the warranty of habitability.[108] Most states do not, however, protect tenants from landlord retaliation unrelated to the warranty. The Uniform Act protects tenants from retaliatory evictions, rent increases, and service decreases following complaints to housing officials or the landlord. The Uniform Act also prohibits retaliatory evictions resulting from a tenant's participation in tenant organizing activities.[109] Some statutes are broader, protecting tenants for lawful activity unconnected with the tenancy, but which generally furthers some significant public policy such as reporting crimes or engaging in political activity.[110] The most extreme deviation from the common law rule is in New Jersey, which has provided security of tenure for its tenants—courts require landlords there to prove a good cause for eviction.[111] But in most states, protection is available only for retaliation aimed at tenancy-related activities.[112] Thus, most tenants are vulnerable to eviction prompted by a landlord's negative reaction to the tenant's lifestyle, political activities, organizational memberships, or other circumstances unrelated to the tenant's fulfillment of his lease obligations. Although evictions of this type are unusual, the loss to the tenant is serious enough to warrant some protection.

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[104] *Id.* § 89-8-21(2).

[105] *Id.* § 89-8-21.

[106] *See, e.g.*, Turner v. Lyon, 539 P.2d 1241 (Colo. 1975) (court declared that security deposit "actually belongs to the tenant").

[107] *See* Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith As A Limitation On The Landlord's Right to Terminate*, 19 GA. L. REV. 483, 491-92 (1985) (under traditional common law rule, landlord, by giving appropriate notice, could terminate periodic tenancy for any reason or no reason at all).

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[108] *See, e.g.*, CAL. CIV. CODE § 1942.5(a) (West 1985) (statute specifically mentions tenant may not be evicted "because of his complaint to an appropriate agency as to tenantability of a dwelling"); DEL. CODE ANN. tit. 25, 5516(a) (1989) (landlord cannot retaliate for complaints of building conditions "which constitute a violation of a building, housing, sanitary, or other code"); TENN. CODE ANN. § 66-28-514 (1982) (cannot retaliate against tenant for complaining of statutory violations or using statutory remedies).

[109] *See* URLTA, *supra* note 3, § 5.10(2).

[110] *See, e.g.*, CAL. CIV. CODE § 1942.5(c) (West 1985) (cannot evict tenant who has only "peacefully exercised any rights under the law"); MINN. STAT. ANN. § 566.03(2)(1) (West 1988) (cannot evict tenant for "good faith attempt to secure or enforce rights . . . under the laws of the state"); N.J. STAT. ANN. § 2A:18-61.1 (Supp. 1991) (requiring "good cause" to evict); Barela v. Superior Court of Orange County, 636 P.2d 582, 586 (Cal. 1981) (under statute tenant could not be evicted for reporting landlord had sexually molested her daughter).

[111] N.J. STAT. ANN. § 2A:18-61.1 (Supp. 1991).

[112] *See, e.g.*, MICH. COMP. LAWS ANN. § 600.6720(1)(c) (1988) (cannot evict tenant for any "lawful act arising out of the tenancy"); TENN. CODE ANN. § 66-28-514 (1982) (cannot evict tenant in retaliation for making use of landlord and tenant statutory provisions). Courts, at least when dealing with month-to-month or tenancies at will, have had a tendency to construe such statutes strictly. *See* Clore v. Fredman, 319 N.E.2d 18, 21 (Ill. 1974) (statute forbidding retaliatory eviction "can only be read as barring the right of a landlord to terminate a lease and evict the tenant in those cases in which that action is undertaken in retaliation for the tenant's complaints to governmental authorities regarding code violations"); Seidelman v. Kouvavus, 373 N.E.2d 53, 56 (Ill. App. Ct. 1978) (tenants claim of retaliatory eviction for petitioning landlady and circulating petitions among cotenants in attempt to rescind rules of mobile home park was not within parameters of retaliatory eviction statute); Dickhut v. Norton, 173 N.W.2d 297, 301-02 (Wis. 1970) (proof of retaliatory eviction must be by "evidence that is clear and convincing" that (1) condition existed in violation of code; (2) landlord knew tenant reported viola-

The Mississippi Act protects against retaliatory evictions through two provisions. The first provides that a landlord must exercise his rights under the Act, including the termination of a periodic tenancy or non-renewal of a lease, in good faith.[113] This provision should provide a remedy for tenants in the rare, but occasional, instance where a landlord has evicted a tenant for joining a local organization, speaking at a public meeting, reporting a crime, or testifying in a state court action — that further a significant public interest.[114] It is also possible that the good faith termination and nonrenewal requirement will invalidate terminations based on the landlord's disapproval of other activities of the tenant which are unrelated to the tenancy but which do not rise to the level of furthering a matter of public interest. For example, the good faith provision could be read to prohibit a landlord from evicting a tenant for a friendship with someone who had offended the landlord.

It is likely that the stringency with which a landlord's good faith is tested will vary with the amount of personal association the landlord has with the property. A landlord may have much greater discretion in terminating tenancies for reasons of personal taste if the landlord is closely associated with the property.[115] For example, a landlord who lives in one of four units in a building may have much greater flexibility in eviction or nonrenewal than an absentee owner of two hundred units.

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tion; (3) landlord terminated lease for sole purpose of retaliation).

[113] Miss. Code Ann. § 89-8-9 (1991).

[114] *See, e.g.*, *Barela*, 636 P.2d at 586 (public policy to protect those who report crimes); Windward Partners v. Delos Santos, 557 P.2d 326,333 (Haw. 1978) (right to speak out at public reasoning hearing); Olson v. Bowen, 192 N.W.2d 188 (Minn. 1971) (public policy to ensure rights provided by constitution).

[115] The Fair Housing Amendments Act of 1988 § 3604(b)(2), 42 U.S.C. 3601 (1988) recognized the need to balance the rights of tenants and the privacy and associational rights of landlords by providing that the discrimination prohibitions of the act do not apply to a landlord living in his own building of four units or less.

The Act also includes a fairly standard provision that a tenant's notice of landlord breach pursuant to section 89-8-13 does not, in and of itself, prevent the landlord from increasing rent, decreasing services, or recovering possession of the unit.[116] The only time that a tenant complaint will foreclose such actions is if the landlord has acted primarily out of retaliation for the tenant's complaint.[117] This provision provides a straightforward protection against retaliation for tenant complaints under the Act. The extent of protection provided by the good faith provision will be determined by judicial interpretation.

Many of the retaliatory eviction statutes also provide for a presumptive period in which the burden of proof shifts to the landlord to prove a non-retaliatory reason for an eviction. For example, if the tenant receives notice to vacate within six months of filing a code complaint, the statute presumes this eviction to be retaliatory unless proven otherwise by the landlord.[118] These provisions recognize the extreme difficulty that a tenant has in proving a landlord's subjective state of mind. It is much easier for the landlord to prove his actual non-retaliatory reason for eviction. The Mississippi statute gives no direction as to the burden of proof in an action for retaliatory eviction.

h. Notice of Termination

The Act lengthens the period for terminating a month-to-month tenancy. Previously, Mississippi had one of the shortest notice periods in the country for termination of monthly tenancies—seven days.[119] The new Act changes the notice period to thirty days for residential tenancies,[120] in line with most states' termination provisions. This also means that a tenant must receive thirty days written notice of any rent increase in a tenancy covered by the Act.[121]

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[116] MISS. CODE ANN. § 89-8-17 (1991).

[117] *Id.*

[118] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1381(B) (1956) (presumption if within six months); N.J. STAT. ANN. § 2A:42-10.12 (Supp. 1991) (no time limit, must always prove not retaliatory); WASH. REV. CODE ANN. § 59.18.240 (1990) (presumption if within 90 days).

[119] MISS. CODE ANN. § 89-7-23 (1991).

[120] *Id.* § 89-8-19.

The Act also appears to override the Mississippi statute which allows landlords to evict for non-payment of rent by giving a three-day notice.[122] Section 89-8-13 of the new Act provides that a landlord may terminate a tenancy for material noncompliance with the rental agreement by giving a thirty day notice.[123] Non-payment of rent is clearly a material noncompliance. The only exception to the thirty day notice period is in case of "substantial violations . . . materially affecting health and safety,"[124] which nonpayment clearly is *not*.

It should also be noted that the Act limits a landlord's right to terminate a tenancy for breach by providing that if the tenant remedies the breach by payment or repairs, or otherwise, the tenancy will not end.[125] If, however, the same breach recurs, the landlord may evict upon fourteen days notice, and the tenant has no right to cure.[126]

4. Omissions From the Act

There are several important areas of landlord tenant law not addressed by the Act. These include the landlord's lien, eviction by self-help, and the landlord's duty to mitigate damages.

a. The Landlord's Lien

Mississippi Code Annotated section 89-7-51 gives landlords a lien on all property of a tenant on the leased premises, to secure the payment of rent that is or may become due.[127] The lien covers both personal property and agricultural products, and exempts goods sold in the ordinary course of business.[128] The lien on agricultural products has priority over all other liens, while the statute subordinates the personal property lien to all prior liens and any subsequent perfected security interests.[129] In order to exercise the lien, the landlord must file a complaint, affidavit, and bond with a justice of the peace.[130] The justice of the peace then issues a distress warrant.[131] The officer executing the warrant seizes the property and notifies the tenant "in person if [the tenant is] found, or if not found, by leaving such notice at the dwelling house."[132] Advertisement for sale begins immediately and the officer will sell the property at the end of three months unless the tenant stops the sale by filing a replevin action and posting a double bond.[133] As an alternative, a tenant may file an affidavit that he does not owe the rent claimed, and the court will proceed with a replevin action without returning the goods to the tenant.[134]

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[121] *See supra* note 22 and accompanying text.

[122] Miss. Code Ann. § 87-7-27 (1991).

[123] *Id.* § 89-8-13.

[124] *Id.* § 89-8-19.

[125] *Id.* § 89-8-13(1)(e).

[126] *Id.* at § 89-8-13(3).

[127] Miss. Code Ann. § 89-7-51 (1991).

[128] *Id.*

This procedure, with its absence of notice and preseizure hearing, is clearly unconstitutional. In the well known trio of due process cases, *Sniadach v. Family Finance Corp.*,[135] *Fuentes v. Sherin*,[136] and *Lugar v. Edmondson Oil Co.*,[137] the Supreme Court established that prejudgment seizure must be accompanied by notice and a meaningful, preseizure opportunity to be heard.[138] Subsequently, tenants in several states challenged the constitutionality of landlord's lien statutes.[139] In *Stroemer v.*

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[129] *Id.*

[130] *Id.* § 89-7-69.

[131] *Id.*

[132] MISS. CODE ANN. § 89-7-69 (1991).

[133] *Id.*

[134] *Id.*

[135] 395 U.S. 337 (1969).

[136] 407 U.S. 67 (1972).

[137] 457 U.S. 922 (1982).

[138] *See Lugar*, 457 U.S. at 942 (holding constitutional requirements of due process apply to garnishment and prejudgment attachment procedures); *Fuentes*, 407 U.S. at 97 (due process requires notice and hearing aimed at establishing the validity of the claim before debtor can be deprived of his property); *Sniadach*, 395 U.S. at 342 (absent notice and a prior hearing, prejudgment garnishment procedures violate fundamental principles of due process).

[139] *See* Adams v. Joseph F. Sanson Investment Co., 376 F. Supp. 61, 66 (D. Nev. 1974) (probable validity of the claim must be established at a hearing, with proper notice before the lien is executed); Phillips v. Guin & Hunt, Inc., 344 So. 2d 568, 574 (Fla. 1977) (constitutionally imperative that a writ issue only after an impartial factual determination of the elements necessary for issuance); *c.f.* Barker v. Rader, 350 F. Supp. 183, 188 (S.D. Fla. 1972) (holding statutes permitting ejectment of tenant and impressment of

Shevin,[140] a United States District Court struck down the Florida distress statute.[141] The court found the distress statute, which was almost identical to the present Mississippi landlord's lien statute, to be unconstitutional.[142] The court ruled that the statutory scheme of "seize it now and leave a note" did not approach the due process requirement of notice and preseizure hearing.[143] In *Hall v. Garson*,[144] the Fifth Circuit invalidated a landlord's lien statute permitting self-help repossession by the landlord.[145]

Judicial treatment of other Mississippi attachment, sequestration, and replevin statutes confirm that the Mississippi landlord's lien statute is unconstitutional. The court struck down sequestration procedures, in which seizure follows the filing of an affidavit and posting bond by the complainant, in 1979.[146] Courts struck down the chancery attachment statute in 1978,[147] and the replevin under bond statute in 1989.[148] All three statutes utilize the same basic scheme for seizure. Landlords should note that the Mississippi Supreme Court, in *Underwood v. Foremost Financial Services*,[149] held that a creditor could be liable for wrongful seizure if he knew or should have known that the stat-

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lien on tenants' property without notice and before hearing ended were constitutionally invalid). Several courts have ruled that there is sufficient evidence to warrant protection of landlords and that the landlord's lien statute is constitutional when tested by the Fourteenth Amendment. *See* Gibraltar Factors Corp. v. Slapo, 129 A.2d 567, 569 (N.J. 1957) (statute giving lien for unpaid rent for a period of not more than six months on machinery and chattels of rentee was constitutional); Hitchcock v. Allison, 572 P.2d 982, 986 (Okla. 1977) (state statute allowing landlord's seizure of tenant's property held constitutional).

[140] 399 F. Supp. 993 (S.D. Fla. 1973).

[141] *Stroemer*, 399 F. Supp. at 994.

[142] *Id.*

[143] *Id.*

[144] 468 F.2d 845 (5th Cir. 1972).

[145] *Hall*, 468 F.2d at 847.

[146] *See* Keeton v. Davis, 475 F. Supp. 204, 213 (N.D. Miss. 1979) (holding Mississippi sequestration statutes which provide for issuance of writ of sequestration only after complaint is filed with clerk of court are unconstitutional, since they do not afford owner of property right to immediate hearing).

[147] *See* MPI, Inc. v. McCullough, 463 F. Supp. 887, 901 (N.D. Miss. 1970) (holding that Mississippi's chancery attachment procedures violated due process clause both facially and as applied to suit alleging breach of an employment contract).

[148] Wyatt v. Cole, 710 F. Supp. 180, 183 (S.D. Miss. 1989).

[149] 563 So. 2d 1387 (Miss. 1990).

ute was unconstitutional.[150] A landlord would be ill-advised to assert a lien under the current statute, which the new Act leaves intact.

b. Self-Help Eviction

One of the pronounced moves away from the common law of leases is the abrogation of landlord self-help eviction. English common law permitted a landlord to use "reasonable" force in evicting a tenant.[151] A few states still follow this rule,[152] but most have abandoned it as a predictable and unnecessary source of violence. In fact, the existence of summary dispossession remedies has led many states to prohibit self-help repossession altogether.[153] Although this is clearly the trend, a number of states, including Mississippi, still permit some form of peaceable self-help eviction if the lessor explicitly reserves the right in the lease.[154] In *Clark v. Service Auto Co.*,[155] the court held that a landlord may reenter without judicial process pursuant to a provision in the lease provided "he does so without breaking doors, windows, or other passages of ingress, and neither uses nor threatens personal violence towards the tenant or those holding possession for him."[156] The court found that self help eviction did not violate any public policy, but that the eviction was merely a recognition of the lease contract made by the parties.[157] In a later case, the court emphasized that self-help does not permit the landlord to bypass necessary notices of termination.[158] If the lease provides that the landlord may declare a forfeiture and reenter upon breach, a reentry without a notice of forfeiture is a wrongful eviction for which the tenant can recover damages.[159] Similarly, a landlord may not use self-help to evict a month-to-month tenant without giving the requisite seven days notice.[160]

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[150] *Underwood*, 563 So. 2d at 1391.

[151] *See* Shoshinski, *supra* note 16, § 6.5.

[152] *See* Kaufman v. Abramson, 363 F.2d 865, 866 (4th Cir. 1966) (landlord entitled to use such reasonable force as was necessary, short of that which threatened death or serious bodily harm, to regain possession); Vaughn v. Mesch, 87 P.2d 177, 180 (Mont. 1939) (if landlord has right of possession, she may use such force as is reasonably necessary to expel a trespasser, being responsible only for injuries caused by excessive force); Shorter v. Shelton, 33 S.E.2d 643, 47 (Va. 1945) (unlawful entry and detainer statute does not deprive landlord of common-law right to take possession by reasonable force of premises to which he is entitled).

[153] *See* Simpson v. Lee, 499 A.2d 889, 893 (D.C. 1985) (self-help repossession is not available in either commercial or residential tenancies); Mendes v. Johnson, 389 A.2d 781, 787 (D.C. 1978) (landlord's common law right of self-help is abrogated); Byler v. Garcia, 685 S.W.2d 116, 119 (Tex. 1985) (by statute tenant may not be "willfully excluded" from premises except by judicial process).

[154] *See* Virginia Iron, Coal & Coke Co. v. Dickenson, 129 S.E. 228, 231 (Va. 1925) (mining company held within its right under contract in evicting discharged employee from company house); Vissenberg v. Breshnahen, 202 P.2d 663, 668 (Wyo. 1949) (where tenant held over after expiration of lease, landlord was not guilty of conversion by exercising right of re-entry).

[155] 108 So. 704 (Miss. 1926).

The new act does not explicitly address the availability of self-help eviction as a remedy. However, an argument can be made that the right of self-help should be judicially abrogated in light of the legislature's intent, evidenced by the Act, to provide residential tenants with greater protections. For example, under prior law, a landlord who reserved the right to terminate a lease for breach and to reenter could give notice and immediately repossess by self-help.[161] Under the new Act, the landlord's right to set the time period for declaring a forfeiture has been severely limited.[162] Section 89-8-13 states that if a tenant fails to comply with the Act or *with the rental agreement* the landlord may terminate by giving a written thirty day notice of termination.[163] If the tenant can remedy the breach by repairs, paying damages *or otherwise*, the rental agreement does not terminate unless it is the second occurrence in six months and the landlord attempted to terminate for the earlier breach.[164] This provision significantly limits a landlord's rights to terminate a fixed term lease and use self-help. Additionally, the Act provides that there is a general obligation of good faith which also includes the landlord's termination of a tenancy or nonrenewal of a lease.[165] The combination of the new limits on termination and the creation of a good faith obligation expressly applicable to terminations may lead the Mississippi Supreme court to conclude that self-help should no longer be available as a remedy.

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[156] *Clark*, 108 So. at 707.

[157] *Id.*

[158] *See* Hotel Markham v. Patterson, 32 So. 2d 255, 255-56 (Miss. 1947) (where landlord changed lock and rented barber shop to another without notice to, or consent of, tenant).

[159] *See id.* at 257.

[160] *See* Lay v. Great Southern Lumber Co., 79 So. 822, 823 (Miss. 1918) (holding that a lease for an indefinite duration constituted a month-to-month lease, thereby requiring notice of eviction).

[161] *See supra* notes 151-153 and accompanying text.

[162] MISS. CODE ANN. § 89-8-13 (1991).

[163] *Id.*

[164] *Id.*

c. *Mitigation of Damages*

The common law view of leases as conveyances of property led courts to hold that if a tenant abandons a lease, the landlord had no duty to attempt to re-rent it. The estate belonged to the tenant for the period of time reserved.[166] Courts in recent years have recognized the need to analyze leases as contracts as well as conveyances and to apply basic contract law doctrine to leases. Thus, some courts, considering the question in recent years, have held that a landlord has a duty to mitigate damages by attempting to re-let the premises upon a tenants' breach by abandonment. If the landlord does not attempt to mitigate damages, the court will prohibit him from recovering any rents that an effort to mitigate would have avoided.[167] Mississippi, has never overruled the outmoded notion that a landlord may sit back and refuse to relet the premises.[168] There is no good reason to continue adherence to this view of leases. Perhaps the court will fill in the gap left by the legislature with respect to this issue, as well as the landlord's lien and the right of self-help.

CONCLUSION

The new Mississippi Residential Landlord-Tenant Act is a solid and important step toward achieving a fair balance between the rights of landlords and tenants. While several important areas are omitted and some provisions are limited or unclear, it has significantly improved the legal position of residential tenants in this state. Several of the problems and ambiguities noted in this article will most likely be cured by judicial interpretation; others require some legislative action. The new statute is reproduced in full in the following appendix, along with proposed changes consistent with the discussion in this article.

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[165] *Id.* § 89-8-9.

[166] *See* JOHN C. CRIBBET & CORVIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 271 (3d ed. 1989).

[167] *Id.* at 278-79.

[168] *See* Adams v. Graham Stove & Heading Co., 160 Miss. 266, 273 (1931).

CHAPTER 8

Residential Landlord and Tenant Act[*]

SEC.

89-8-1. Short title.
89-8-3. Application of chapter.
89-8-5. Waiver of rights prohibited; provisions prohibited in rental agreement.
89-8-7. Definitions; agent of landlord.
89-8-9. Obligation to act in good faith.
89-8-11. Rules and regulations of landlord concerning tenant's use and occupancy of premises.
89-8-13. Right to terminate tenancy for breach; notice of breach; return of prepaid rent and security.
89-8-15. Repair of defects by tenant.
89-8-17. Rights of landlord after expiration of rental agreement.
89-8-19. Length of term of tenancy; notice to terminate tenancy; exception to notice requirement.
89-8-21. Tenant's security deposit.
89-8-23. Duties of landlord.
89-8-25. Duties of tenant.
89-8-27. Housing authorities authorized to contract with tenant management organizations; authority to sell public housing units to tenant management organizations.

§ 89-8-1. Short title.

This chapter shall be known and may be cited as the "Residential Landlord and Tenant Act."

SOURCES: Laws, 1991, ch. 478, § 1, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

§ 89-8-3. Application of chapter.

(1) This chapter shall apply to, regulate and determine rights, obligations and remedies under any rental agreement entered into after July 1, 1991, *[entered into, extended, or renewed after*

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[*] Editor's Note: *The Residential Landlord and Tenant Act [The Act] is presented in its entirety. The author's proposed additions are indicated by underlining the language to be altered or deleted, followed by the author's proposal in brackets.*

July 1, 1991, and, in the case of periodic tenancies, to the first period beginning after July 1, 1991.] wherever made, for a dwelling unit located within this state.

(2) The following arrangements are not governed by this chapter:

(a) Residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious or similar service;

(b) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest;

(c) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

(d) Transient occupancy in a hotel, motel or lodgings;

(e) Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative; or

(f) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes or when the occupant is performing agricultural labor for the owner and such premises are rented for less than fair rental value. *[Delete.]*

SOURCES: Laws, 1991, ch. 478, § 2, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

§ 89-8-5. Waiver of rights prohibited; provisions prohibited in rental agreement.

In any agreement, oral or written, for the rental of real property as a dwelling place, a landlord or tenant may not agree to waive or otherwise forego any of the rights, duties or remedies under this chapter, except as otherwise provided by this chapter. No rental agreement may provide that the tenant or the landlord:

(a) Authorizes any person to confess judgment on a claim arising out of the rental agreement; or

(b) Agrees to the exculpation or limitation of any liability of the landlord arising as a result of the landlord's willful misconduct or the costs connected therewith. *[negli-*

gence or breach of the rental agreement or this Act.]

SOURCES: Laws, 1991, ch. 478, § 3, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Cross references—

Right of landlord and tenant to agree that tenant perform duties of landlord, subject to the provisions of this section, see § 89-8-23.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 11-46.

51C CJS, Landlord and Tenant §§ 184-251.

Annotations—

Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 ALR3d 786.

Validity of exculpatory clause in lease exempting lessor from liability. 49 ALR3d 321.

§ 89-8-7. Definitions; agent of landlord.

(1) Subject to additional definitions contained in subsequent sections of this chapter which apply to specific sections or parts thereof, and unless the context otherwise requires, in this chapter:

(a) "Building and housing codes" includes any law, ordinance, or governmental regulation concerning fitness for habitation, construction, maintenance, operation, occupancy or use of any premises or dwelling unit:

(b) "Dwelling unit" means a structure or the part of a structure that is used as a home, residence or sleeping place by one (1) person who maintains a household or by two (2) or more persons who maintain a common household;

(c) "Good faith" means honesty in fact in the conduct of the transaction concerned and observation of reasonable community standards of fair dealing;

(d) "Landlord" means the owner, lessor or sublessor of the dwelling unit or the building of which it is a part, or the agent representing such owner, lessor or sublessor;

(e) "Organization" includes a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, and any other legal or commercial entity;

(f) "Owner" means one or more persons, jointly or severally, in whom is vested (i) all or part of the legal title to property or (ii) all or part of the beneficial ownership and a right to present use and enjoyment of the premises, and the term includes a mortgagee in possession;

(g) "Premises" means a dwelling unit and the structure of which it is a part, facilities and appurtenances therein, and grounds, areas and facilities held out for the use of tenants generally or whose use is promised to the tenant;

(h) "Rent" means all payments to be made to the landlord under the rental agreement;

(i) "Rental agreement" means all agreements, written or oral, and valid rules and regulations adopted under Section 89-8-11 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises;

(j) "Tenant" means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others;

(k) "Qualified tenant management organizations" means any organization incorporated under the Mississippi Nonprofit Corporation Act, a majority of the directors of which are tenants of the housing project to be managed under a contract authorized by this section and which is able to conform to standards set by the United States Department of Housing and Urban Development as capable of satisfactorily performing the operational and management functions delegated to it by the contract.

(2) For purposes of giving any notice required under this chapter, notice given to the agent of the landlord is equivalent to giving notice to the landlord. The landlord may contract with an agent to assume all the rights and duties of the landlord under this chapter; provided, however, that such a contract does not relieve the landlord of ultimate liability in regard to such rights and duties.

SOURCES: Laws, 1991, ch. 478, § 4, eff from and after July 1, 1991,

and shall apply to rental agreements entered into after such date.

Cross references—
Mississippi Nonprofit Corporation Act, see § 79-11-101, et seq.

§ 89-8-9. Obligation to act in good faith.

Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter, including the landlord's termination of a tenancy or nonrenewal of a lease, imposes an obligation of good faith in its performance or enforcement.

SOURCES: Laws, 1991, ch. 478, § 5, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

§ 89-8-11. Rules and regulations of landlord concerning tenant's use and occupancy of premises.

(1) A landlord may, from time to time, adopt rules or regulations, however described, concerning the tenant's use and occupancy of the premises. They are enforceable against the tenant only if:

(a) Their purpose is to promote the convenience, safety or welfare of the tenants in the premises, preserve the landlord's property from abuse, or make a fair distribution of services and facilities provided for the tenants generally;

(b) They are reasonably related to the purpose for which they are adopted;

(c) They apply to all tenants in the premises in a fair manner;

(d) They are sufficiently explicit in their prohibition, direction or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply;

(e) They are not for the purpose of evading the obligations of the landlord.

(2) A rule or regulation adopted or amended after the tenant enters into the rental agreement is enforceable against the tenant if reasonable notice of its adoption or amendment is given to the tenant and it does not work a substantial modification of the

rental agreement.

(3) If the dwelling unit is an apartment in a horizontal property regime, the tenant shall comply with the bylaws of the association of the apartment owners; and if the dwelling unit is an apartment in a cooperative housing corporation, the tenant shall comply with the bylaws of the corporation.

(4) Unless otherwise agreed, the tenant shall occupy his dwelling unit only as a dwelling unit.

SOURCES: Laws, 1991, ch. 478, § 6, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Cross references—

Definition of "rental agreement" as including all rules and regulations adopted under this section, see § 89-8-7.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 11-46.
51C CJS, Landlord and Tenant §§ 184-251.

Annotations—

Express or implied restrictions on lessee's use of residential property for business purposes. 46 ALR4th 496.

Validity of exculpatory clause in lease exempting lessor from liability. 49 ALR3d 321.

§ 89-8-13. Right to terminate tenancy for breach; notice of breach; return of prepaid rent and security.

(1) If there is a material noncompliance by the tenant with the rental agreement or the obligations imposed by Section 89-8-25, the landlord may terminate the tenancy as set out in subsection (3) of this section or resort to any other remedy at law or in equity except as prohibited by this chapter.

(2) If there is a material noncompliance by the landlord with the rental agreement or the obligations imposed by Section 89-8-23, the tenant may terminate the tenancy as set out in subsection (3) of this section or resort to any other remedy at law or in equity except as prohibited by this chapter.

(3) The nonbreaching party may deliver a written notice to the party in breach specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than thirty (30) days after receipt of the

notice if the breach is not remedied within a reasonable time not in excess of thirty (30) days; *[fourteen (14) days]* and the rental agreement shall terminate and the tenant shall surrender possession as provided in the notice subject to the following:

(a) If the breach is remediable by repairs, the payment of damages, or otherwise, and the breaching party adequately remedies the breach prior to the date specified in the notice, the rental agreement shall not terminate;

(b) In the absence of a showing of due care by the breaching party, if substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six (6) months, the nonbreaching party may terminate the rental agreement upon at least fourteen (14) days' written notice specifying the breach and the date of termination of the rental agreement.

(c) Neither party may terminate for a condition caused by his own deliberate or negligent act or omission or that of a member of his family or other person on the premises with his consent.

(4) If the rental agreement is terminated, the landlord shall return all prepaid and unearned rent and security recoverable by the tenant under Section 89-8-21.

(5) [Except as provided in this act, the landlord or tenant may sue for damages or to obtain injunctive relief for noncompliance with the rental agreement or this Act. In a landlord's action for rent or possession, a tenant may counterclaim for any amount due under the rental agreement on this Act.]

SOURCES: Laws, 1991, ch. 478, § 7, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Cross references—

Rights of landlord after expiration of rental agreement notwithstanding the provisions of this section, see § 89-8-17.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 300-304, 990-1019.

51C CJS, Landlord and Tenant §§ 102-119.

16 Am Jur Pl and Pr Forms (Rev), Landlord and Tenant, Forms 171-182.

Annotations—

Waiver of statutory demand-for-rent due or notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent—modern cases. 31 ALR4th 1254.

Express or implied restriction on lessee's use of residential property for business purposes. 46 ALR4th 496.

Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction. 86 ALR3d 352.

§ 89-8-15. Repair of defects by tenant.

(1) If, within thirty (30) days *[fourteen (14) days]* after written notice to the landlord of a specific and material defect which constitutes a breach of the terms of the rental agreement or of the obligation of the landlord under Section 89-8-23, the landlord fails to repair such defect, the tenant:

(a) May repair such defect himself; and

(b) Except as otherwise provided in subsection (2) of this section, shall be entitled to reimbursement of the expenses of such repairs within forty-five (45) days after submission to the landlord of receipted bills for such work, provided that:

(i) The tenant has fulfilled his affirmative obligations under Section 89-8-25; *[Delete]*

(ii) The expenses incurred in making such repairs do not exceed an amount equal to one (1) month's rent;

(iii) The tenant has not exercised the remedy provided by this section in the six (6) months immediately preceding; and

(iv) The tenant is current in his rental payment.

(2) A tenant shall not be entitled to be reimbursed for repairs made pursuant to this section in an amount greater than the usual and customary charge for such repairs.

(3) Before correcting a condition affecting facilities shared by more than one (1) dwelling unit, the tenant shall notify all other tenants sharing such facilities of his plans and shall so arrange the work as to create the least practicable inconvenience to the other tenants.

(4) The cost of repairs made by a tenant pursuant to this section may be offset against future rent.

(5) No provision of this section shall be construed to grant a lien against the real property.

SOURCES: Laws, 1991, ch. 478, § 8, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 350, 777, 860-868, 946.

51C CJS, Landlord and Tenant §§ 372, 373, 387-401.

Annotations—

Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 ALR3d 786.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities. 22 ALR3d 521.

Failure of landlord to make, or permit tenant to make, repairs or alterations required by public authority as constructive eviction. 86 ALR3d 352.

Tenant's right, where landlord fails to make repairs, to have them made and set off cost against rent. 40 ALR3d 1369.

§ 89-8-17. Rights of landlord after expiration of rental agreement.

Notwithstanding the provisions of Section 89-8-13, the landlord may, at any time after the expiration of a rental agreement, recover possession of the dwelling unit, cause the tenant to quit the dwelling unit involuntarily, demand an increase in rent or decrease the services to which the tenant has been entitled in accordance with any other provisions of this chapter, if such actions by the landlord did not have the dominant purpose of retaliation against the tenant for his actions authorized under this chapter and the landlord received written notice of each condition which was the subject of such actions of the tenant.

SOURCES: Laws, 1991, ch. 478, § 9, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 990-1019.

51C CJS, Landlord and Tenant §§ 89-101.

16 Am Jur Pl and Pr Forms (Rev), Landlord and Tenant, Forms 41-52.

Annotations—

Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 ALR3d 177.

§ 89-8-19. Length of term of tenancy; notice to ter-

minate tenancy; exception to notice requirement.

(1) Unless the rental agreement fixes a definite term a tenancy shall be week to week in case of a tenant who pays weekly rent, and in all other cases month to month.

(2) The landlord or the tenant may terminate a week-to-week tenancy by written notice given to the other at least seven (7) days prior to the termination date.

(3) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty (30) days prior to the termination date.

(4) Notwithstanding the provisions of this section or any other provision of this chapter to the contrary, notice to terminate a tenancy shall not be required to be given when the landlord or tenant has committed a substantial violation of the rental agreement or this chapter that materially affects health and safety.

SOURCES: Laws, 1991, ch. 478, § 10, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Cross references—

Amount of notice required to terminate tenancy not governed by this section, see § 89-7-23.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 65-75.

50 Am Jur 2d, Landlord and Tenant §§ 1205-1218.

51C CJS, Landlord and Tenant §§ 89, 130, 142, 144, 150, 173, 183.

Annotations—

Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 ALR3d 177.

Retaliatory eviction of tenant for reporting landlord's violation of law. 40 ALR3d 753.

Lease provisions allowing termination or forfeiture for violation of law. 92 ALR3d 967.

Circumstances excusing lessee's failure to give timely notice of exercise of option to renew or extend lease. 27 ALR4th 266.

Sufficiency as to method of giving oral or written notice exercising option to renew or extend lease. 29 ALR4th 903.

What constitutes timely notice of exercise of option to renew or extend lease. 29 ALR4th 956.

Waiver of statutory demand-for-rent due or of notice-to-quit prerequisite of summary eviction of lessee for nonpayment of rent -modern cases. 31 ALR4th 1254.

Sufficiency as to parties giving or receiving notice of exercise of option to renew or extend lease. 34 ALR4th 857.

Specificity of description of premises as affecting enforceability of lease. 73 ALR4th 236.

§ 89-8-21. Tenant's security deposit.

(1) Any payment or deposit of money, the primary function of which is to secure the performance of a rental agreement or any part of such an agreement, other than a payment or deposit, including an advance payment of rent, made to secure the execution of a rental agreement shall be governed by the provisions of this section.

(2) Any such payment or deposit of money shall be held *[shall be held in escrow]* by the landlord for the tenant who is a party to such agreement. The claim of a tenant to such payment or deposit shall be governed by the provisions of this section. The claim of a tenant to such payment or deposit shall be prior to the claim of any creditor of the landlord.

(3) The landlord, by written notice delivered to the tenant, may claim of such payment or deposit only such amounts as are reasonably necessary to remedy the tenant's defaults in the payment of rent, to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear, to clean such premises upon termination of the tenancy *[Delete]*, or for other reasonable and necessary expenses incurred as a result of the tenant's default, if the payment or deposit is made for any or all of those specific purposes. The written notice by which the landlord claims all or any portion of such payment or deposit shall itemize the amounts claimed by such landlord. Any remaining portion of such payment or deposit shall be returned to the tenant no later than forty-five (45) days *[fourteen (14) days]* after the termination of his tenancy, the delivery of possession and demand by the tenant.

(4) The retention by a landlord or transferee of a payment or deposit or any portion thereof, in violation of this section and with absence of good faith, may subject the landlord or his transferee to damages not to exceed Two Hundred Dollars ($200.00) *[entitles the tenant to recover twice the amount wrongfully withheld and reasonable attorneys fees]* in addition to any actual damages.

SOURCES: Laws, 1991, ch. 478, § 11, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Cross references—

Duty of landlord to return all prepaid and unearned rent and security recoverable by tenant under this section if rental agreement is terminated, see § 89-8-13.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 651-657.

51D CJS, Landlord and Tenant §§ 472-476.

§ 89-8-23. Duties of landlord.

(1) A landlord shall at all times during the tenancy:

(a) Comply with the requirements of applicable building and housing codes materially affecting health and safety;

(b) Maintain the dwelling unit, its plumbing, heating and/or cooling system, in substantially the same condition as at the inception of the lease, reasonable wear and tear excluded, unless the dwelling unit, its plumbing, heating and/or cooling system is damaged or impaired as a result of the deliberate or negligent actions of the tenant.

[(c) maintain the premises in a habitable condition;

(d) maintain common areas in a clean and safe condition.]

(2) No duty on the part of the landlord shall arise under this section in connection with a defect which is caused by the deliberate or negligent act of the tenant or persons on the premises with the tenant's permission.

(3) Subject to the provisions of Section 89-8-5, the landlord and tenant may agree in writing that the tenant perform some or all of the landlord's duties under this section, but only if the transaction is entered into in good faith. *[and is set out in a separate writing signed by the tenant and, in the case of (1)(b), supported by separate consideration.]*

(4) No duty on the part of the landlord shall arise under this section in connection with a defect which is caused by the tenant's affirmative act or failure to comply with his obligations under Section 89-8-25.

SOURCES: Laws, 1991, ch. 478, § 12, eff from and after July 1, 1991, and shall apply to rental agreements entered into after

such date.

Cross references—

Right of tenant to terminate tenancy for landlord's noncompliance with obligations imposed by this section, see § 89-8-13.

Right of tenant to make repairs of defects constituting breach of landlord's obligations under this section, see § 89-8-15.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 761-921.

51C CJS, Landlord and Tenant §§ 366-373, 402-407.

Annotations—

Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 ALR3d 786.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities. 22 ALR3d 521.

Validity of exculpatory clause in lease exempting lessor from liability. 49 ALR3d 321.

§ 89-8-25. Duties of tenant.

A tenant shall:

(a) Keep that part of the premises that he occupies and uses as clean and as safe as the condition of the premises permits;

(b) Dispose from his dwelling unit all ashes, rubbish, garbage and other waste in a clean and safe manner in compliance with community standards;

(c) Keep all plumbing fixtures in the dwelling unit used by the tenant as clean as their condition permits;

(d) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, in the premises;

(e) Not deliberately or negligently destroy, deface, damage, impair or remove any part of the premises or knowingly permit any other person to do so;

(f) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of their premises;

(g) Inform the landlord of any condition of which he had actual knowledge which may cause damage to the premises;

(h) To the extent of his legal obligation, maintain the dwelling unit in substantially the same condition, reasonable wear and tear excepted, and comply with the requirements of applicable building and housing codes materially affecting health and safety. *[Delete.]*

SOURCES: Laws, 1991, ch. 478, § 13, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

Cross references—

Right of landlord to terminate tenancy for tenant's noncompliance with obligations imposed by this section, see § 89-8-13.

Right of tenant to receive reimbursement for expense of repairs if tenant has fulfilled his affirmative obligations under this section, see § 89-8-15.

No duty on part of landlord arises in connection with defect caused by tenant's failure to comply with his obligations under this section, see § 89-8-23.

Research and Practice References—

49 Am Jur 2d, Landlord and Tenant §§ 922-989.

51C CJS, Landlord and Tenant §§ 102-119, 387-401.

Annotations—

Express or implied restrictions on lessee's use of residential property for business purposes. 46 ALR4th 496.

Validity, construction, and effect of provisions of lease exempting landlord or tenant from liability on account of fire. 15 ALR3d 786.

Who, as between landlord and tenant, must make, or bear expense of, alterations, improvements, or repairs ordered by public authorities. 22 ALR3d 521.

Tenant's obligation under lease as basis of tort liability to third persons. 44 ALR3d 943.

Validity of exculpatory clause in lease exempting lessor from liability. 49 ALR3d 321.

§ 89-8-27. Housing authorities authorized to contract with tenant management organizations; authority to sell public housing units to tenant management organizations.

Any county, municipality, regional housing authority or local housing authority in the state may make application to and contract with qualified tenant management organizations for the operation and management of housing projects of the authority as a means of reducing vacancies, reducing administrative costs and creating jobs from the establishment of maintenance teams. Such counties, municipalities, regional housing authorities or local housing authorities shall have the authority to sell public housing units to such tenant management organizations, provided that such sale is in compliance with any applicable federal laws and regulations and any applicable state laws and regulations.

SOURCES: Laws, 1991, ch. 478, § 14, eff from and after July 1, 1991, and shall apply to rental agreements entered into after such date.

§ 89-8-29. Abandonment.

If a tenant abandons the premises, the landlord has an obligation to attempt to mitigate damages by reletting the unit at a fair rental. If the landlord fails to do use reasonable efforts to relet, he may not recover rent for the remainder of the period.

§ 89-8-31. Landlord Liens; Distress for Rent.

(a) A landlord's lien or security interest in the tenant's household goods is not enforceable unless perfected prior to the effective date of this Act.
(b) Distraint for rent is abolished.

§ 89-8-33. §§ 2.103 from Uniform Act, section (a)-(c).

OVERCOMING OBSTACLES TO FEDERAL FAIR HOUSING ENFORCEMENT IN THE SOUTH: A CASE STUDY IN JURY NULLIFICATION

*John P. Relman**

INTRODUCTION

On June 27, 1990, trial commenced before a six-person Arkansas jury in the case of *United States of America and Melvin White v. Natalee Schay and B. Jeffery Pence.*[1] The verdict, rendered by the jury two days later, would prove momentous. But even before counsel had uttered a single word of their opening arguments, it would have been difficult to overstate the symbolic importance of this fair housing case.

The reasons for this are twofold. First, *United States v. Schay* was the first suit filed by the Department of Justice under the new amendments to the Fair Housing Act of 1968.[2] These amendments grant the United States authority for the first time to prosecute discrimination complaints filed with the Department of Housing and Urban Development (HUD) in federal court before a federal jury, and provide a victim of housing discrimination for the first time with the right to elect representation by the Department of Justice.[3] *United States v. Schay*, therefore, represented the advent of a new era in federal fair housing enforcement in which the United States — no longer limited to pattern and practice cases, or cases of general public importance[4] — would be responsible for prosecuting hundreds of routine housing discrimination cases in federal courts across the country.

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[1] 746 F. Supp. 877 (E.D. Ark. 1990), *currently pending appeal*, Nos. 90-2826, 90-2919 (8th Cir.). The author represented The National Fair Housing Alliance in its role as amicus curiae in the appeal of this case before the U.S. Court of Appeals for the Eighth Circuit.

[2] Title VIII of the Civil Rights Act of 1968, *as amended by* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430 (eff. March 12, 1989), (codified at 42 U.S.C. §§ 3601-3619, 3631 (1988)).

[3] 42 U.S.C. § 3612(o) (1988).

Second, the case represented the government's first jury trial under the new Fair Housing Act. But it was not just any jury trial. *United States v. Schay* raised allegations of race discrimination, and would be heard by a jury selected from residents of a deep South state historically hostile to civil rights legislation and unreceptive to the presence of federal prosecutors from Washington, D.C.[5]

The evidence marshalled by the government and presented to the jury over the course of the three-day trial was nothing short of remarkable. Plaintiff Melvin White, a black attorney and law clerk for a federal district judge in Little Rock, testified about his efforts to rent an apartment that mysteriously became unavailable when he appeared one evening to meet the real estate agent. Associates of the plaintiff, who were white, were told shortly after Mr. White's visit that the apartment was in fact available.

The defendants' entire case rested on the testimony of two witnesses, one of whom, Mr. Daley, offered the critical alibi that formed the key to the defense. These two witnesses were impeached by the prosecution with a thoroughness rarely witnessed in any courtroom. After viewing the performance of Mr. Daley, the district judge concluded that while "it might be an exaggeration" to term Mr. Daley "the least credible witness appearing in this court during the last nine years, . . . he would certainly be within the top five."[6] With respect to the other defense witness, the court noted caustically that her testimony was "filled with inconsistencies," and "seemed to change as she learned more about plaintiff's case."[7]

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[4] 42 U.S.C. § 3614(a) (1988).

[5] United States v. Schay, 746 F. Supp. 877 (E.D. Ark. 1990). Little Rock, Arkansas was the site of one of this country's most prolonged and vitriolic civil rights battles. *See* Cooper v. Aaron, 358 U.S. 1, 8-15 (1958) (depicting extraordinary efforts of white citizens of Little Rock, in conjunction with legislators and executive officials of State of Arkansas, to resist openly Supreme Court's mandate to desegregate public schools).

[6] *Schay*, 746 F.Supp. at 884.

Thirty-three minutes after receiving the case, an all-white jury returned a shocking verdict in favor of the defendants. On the government and plaintiff White's motion for new trial, the district judge asserted repeatedly that it was convinced that a "miscarriage of justice" had occurred, but declined to grant the motion out of confusion over the current new trial standard within the Eighth Circuit.[8] While questioning the "intellectual[] honest[y]" of its ultimate holding, the court concluded that it made the most sense to deny the motion to enable the plaintiffs to appeal the matter and obtain a clarification of the new trial standard.[9]

The technical legal issue now pending before the Eighth Circuit is whether the district court erred in holding that on a motion for new trial it was precluded from weighing the evidence or assessing witness credibility to determine if the jury verdict resulted in a miscarriage of justice. The Eighth Circuit's ruling, however, will have important ramifications for future fair housing enforcement in the South that reach far beyond the narrowly defined question of procedure it has been asked to address.

For over three and one half decades, stretching from the 1930's to the 1960's, Congress has expressed concern about the danger of jury nullification by Southern juries in civil rights cases. That concern is richly documented in congressional debates and committee reports. The verdict in this case represents precisely the type of jury nullification that Congress feared. In the face of overwhelming evidence of guilt the jury took just minutes to render a defendants' verdict.

Federal Rule of Civil Procedure 59 (motions for new trial) remains the central protection for victims of discrimination, like Melvin White, who have been deprived of "the verdict to which [they] . . . [are] entitled."[10] The Eighth Circuit is now faced with a unique opportunity to craft and clarify a Rule 59 standard that provides meaningful protection against jury nullification. How it undertakes that task will greatly affect the ability of the government and private plaintiffs to enforce their rights under the new Fair Housing Act in areas of the country that have been historically hostile to civil rights litigation.

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[7] *Id.* at 883.

[8] *Id.* at 882-83, 886.

[9] *Id.* at 886.

[10] Curtis v. Loether, 415 U.S. 189, 198 (1974).

This article argues that in fashioning the Rule 59 standard, appellate courts like the Eighth Circuit should be mindful of Congress' longstanding concern over jury nullification in civil rights cases, and should pay heed to statistical evidence from the Administrative Office of the Courts indicating that Congress' concern about Southern juries may still be timely and relevant. If the Department of Justice and private parties are to fulfill effectively the mandate of the Fair Housing Act "to provide, within constitutional limitations, for fair housing throughout the United States,"[11] it is essential that appellate courts provide district judges with sufficient discretion in reviewing new trial motions to protect deserving plaintiffs like Melvin White from biased local juries.

This article is divided into four parts. Part I sets forth the factual background and holding in *United States v. Schay*. Part II provides an overview of the legislative history underscoring congressional concern about nullification. Part III discusses the important role that motions for new trial and judgment notwithstanding the verdict (JNOV) have played and continue to play as bulwarks against jury nullification. Finally, part IV briefly suggests ways in which a new trial standard might be fashioned so as to preserve the rights of deserving fair housing plaintiffs without unduly interfering with the traditional functions and province of the jury.

I. THE FACTUAL BACKGROUND OF *UNITED STATES V. SCHAY*

In order to understand the significance of the verdict in *Schay* and the importance of the issues now pending on appeal for future fair housing enforcement efforts, it is necessary to outline briefly the key facts supporting the government's case and the nature of the lower court's ruling.

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[11] 42 U.S.C. § 3601 (1988).

In September 1988 plaintiff Melvin White, a native of Arkansas, a veteran of the Air Force and an honors graduate of Morehead College and the University of Virginia Law School, was employed as a law clerk for Chief Judge G. Thomas Eisele of the United States District Court for the Eastern District of Arkansas. On September 29, 1988, White made an appointment by telephone with real estate agent Natalee Schay to inspect a three-bedroom apartment in Little Rock that had been advertised for rent. Several hours after speaking with Schay, White arrived at the apartment and was told by Schay that the property had been rented.

Suspecting discrimination, White asked two of his white coworkers to inquire about the apartment the following morning. Both of the co-workers spoke with Schay the next morning, and both were told that the apartment was still available. White also asked a friend to inquire about the apartment later the same morning. The friend was also told by Schay that the apartment was available. Still later that same morning, White called to inquire about the apartment himself but did not reveal his identity. He too was told by Schay that the apartment was available. White promptly filed a fair housing complaint with HUD.

Shortly after White filed his HUD complaint, Schay was interviewed by HUD investigators. At the time of the interview, Schay did not know that "testers" had called at White's request to inquire about the apartment. Schay stated under oath to the HUD investigators that just before White arrived to see the property, she rented the apartment to a white couple. Schay went on to explain that the following *afternoon* she received a telephone call from the owner of the apartment advising her that the white couple had not paid a deposit or signed a lease, and that the apartment should be placed back on the market.

Several months later, after learning that testers had called the following morning and were prepared to contradict her story, Schay backtracked, again under oath. This time Schay asserted that the owner had not called the following afternoon, but rather early in the morning.

Schay also changed her story in a second important respect. Although she had sworn to HUD investigators that she had rented the apartment to a white couple, Schay now stated under oath in a deposition that only one person, the male half of a couple, had viewed the property and agreed to rent the apartment before White had arrived. This change in her story was clearly triggered by the mysterious appearance of Frank Daley, a man claiming to be the person to whom the apartment was rented before White arrived. Daley asserted that he called Schay after reading about the case in the newspaper and told Schay that he was the person to whom Schay had rented the apartment. Daley maintained that he had answered the advertisement on behalf of himself and two potential roommates after being kicked out of his house by his wife. Daley insisted that he and his wife reconciled their differences the night White looked at the property, and thereafter decided not to rent the apartment.

Upon taking the stand at trial, Schay told the jury that although she did not recognize Daley when he surfaced just before her deposition, she had "no reason to think he was not that person" to whom she rented the apartment.[12] Altering her story yet again, Schay now asserted that it was definitely not a couple who had rented the house shortly before White arrived. Schay offered the jury no explanation as to why she had made no attempt to contact White after the alleged Daley contract fell through, even though the apartment remained vacant for four months after White's visit before finally being rented to a white family at a discounted rental rate.

Even more devastating from the defendants' standpoint than the government's impeachment of Schay based on her three conflicting sworn statements, was the embarassing performance of Daley, whose credibility evaporated as the government probed his character and story. Daley testified on direct that he had worked at the Little Rock Fire Department, and at the time he answered the advertisement for the apartment had just signed a $96,000 mortgage with his wife for a new home they had completed building. Daley also claimed that shortly after signing the mortgage, he and his wife had a fight, and he was forced to look for a new apartment.

Daley's impeachment began with the person in charge of the construction of Daley's home, Daniel Carter, who testified that he knew Daley and his wife were living together in their new home during the relevant time period because Daley let him into the house every morning at 7:30 a.m. Carter stated that he had never seen any sign of marital problems, and noted that the Daleys had been so anxious to move into their new home together that he had been forced to call the police to keep them out until after the closing. Carter told the jury that after working with Daley every day for four months, he had concluded that Daley was not a truthful person.

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[12] Trial Transcript of United States v. Schay, at 223-24.

On cross-examination Daley revealed that he had been suspended from the Fire Department for dishonesty and abusing the sick leave policy, and then later dismissed from the Department for insubordination, making false statements, and poor job performance. The Captain of the Little Rock Fire Department testified that Daley "lacked the ability to tell the truth" and "was not a truthful person."[13] Daley also admitted that at the same time that he had signed a mortgage for $96,000 he had filed a petition to proceed in forma pauperis in the United States Court of Appeals in a case arising out of his dismissal from the Little Rock Fire Department. Finally, Daley further conceded that three days after he allegedly agreed to rent an apartment from Schay he wrote another letter to the Eighth Circuit claiming that he had no funds and did not expect to have any funds until the spring.

Both the district court and the defendants were shocked by Daley's performance. Evaluating Daley's testimony, the district court stated that it was

> [i]mpossible to express in 'cold print' the feeling that this court had about Mr. Daley's credibility after viewing him testify. At the end of his testimony, the court was convinced that his testimony should have been given no weight by the trier of fact.[14]

The court minced no words placing Daley's testimony and "magical appearance upon the scene"[15] in a broader perspective:

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[13] *Schay*, 746 F. Supp. at 885.

[14] *Id.*

[15] *Id.*

> In respect to the testimony and actions of Frank Daley, it might be an exaggeration to say that he was the least credible witness appearing in this court during the last nine years that the writer of this opinion has held this office, but he would certainly be within the top five.[16]

The court was equally direct in its assessment of defendant Schay's credibility:

> Ms. Schay's initial explanation was, of course, directly contradicted by the [testers] . . . . Apparently sometime after February 22, 1989, Ms. Schay learned that these telephone calls had been made, and her explanation of the sequence of events changed significantly. . . . Ms. Schay admitted at trial that . . . she had "changed her story" but [insisted] that her version given at trial was the correct one.
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> . . . .
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> Then, on June 29 or 30, 1989, Frank Daley appeared almost "out of the blue" and Ms. Schay's story again changed significantly. Although she agreed at the trial that she did not recognize Mr. Daley when he appeared on the scene she, at least at the trial, readily accepted his story and decided that the "white couple" and "family" that she had said up to that point had agreed to rent the property, now became an "individual" or a "he" or a "him" and she no longer remembered that the prospective renters were a couple or a family.
>
> Those inconsistencies, coupled with the fact that the evidence indicates that, immediately upon seeing Mr. White she told him that the property was rented, causes this court to doubt her present version of the event. That concern is significantly amplified by the fact that, even though Ms. Schay knew that Mr. White was interested in renting the house, she made no attempt to contact him even though it had been vacant since the previous June and remained vacant until the rent was reduced and it was rented on November 3, 1988.[17]

In closing argument, defense counsel made much of the fact that Mr. White (who at the time of trial was living in Washington, D.C.) and the Justice Department had come to Arkansas from Washington, D.C. "literally bring[ing] grief and disruption into [the defendants'] lives" and "drag[ging] them through all of these proceedings."[18] Defense counsel told the jury that their verdict would have "extreme importance from a precedent setting standpoint . . . as to what is likely to happen . . . in this particular location, Little Rock, Arkansas,"[19] and asked the jurors: "What kind of people do they think we are down here?"[20] Defense counsel concluded his closing argument with a thinly veiled effort to re-kindle longstanding local hostility to civil rights enforcement efforts by the federal government:

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[16] *Id.* at 884.

[17] *Id.* at 883-84.

> I am sad that when there is a small mix-up like that occurs here that it invokes the strongest force on earth in the form of mine and your government. . . . I regret that when it did happen, that our people in the Department of Justice were not willing to listen to any kind of explanation but just declare Armageddon, just bring it all down and never listen . . . .
>
> I am sorry that of the first of these cases that there must be literally thousands of cases throughout the United States where landlords do not rent to blacks and have not and have discriminatory practices. I am sorry to the bottom of my soul that they would pick out Little Rock, Arkansas, and bring the first one like this where there is not any evidence of racial discrimination. That makes me sick to my soul that they would do that and not ever turn it around, not ever slow it down.
>
> Ladies and gentlemen, in the real world, which is why you have been selected to rule on this case, because you live in the real world; in the real world justice is a two way street and in the eyes of the law and justice and what is really pure justice, Little Rock, Arkansas is just like any other place. . . . [21]

Nothwithstanding all of the evidence marshalled by the government, Melvin White's sterling credentials, and the thorough impeachment of Schay and Daley, the all-white six person jury took only thirty-three minutes to choose a foreperson, deliberate, and return a verdict in favor of the defendants.

The court had no trouble concluding that the jury's ultimate decision, relying as it invariably must have on Daley's and Schay's incredible testimony, amounted to a "miscarriage of justice,"[22] and that the defendants' asserted legitimate non-discriminatory reason — the Daley alibi — "should have been given no weight by the trier of fact."[23] Yet the court nevertheless denied the plaintiffs' motion for new trial in the belief that a trial judge should not grant such a motion if reasonable minds could have differed as to the proper result. Although aware of a line of cases in the Eighth Circuit permitting a trial court to "weigh the evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict,"[24] the lower court elected to deny the motion and thereby allow the court of appeals to clarify what it believed were divergent and confusing interpretations of the "new trial" standard within the Eighth Circuit. From a practical standpoint, the district court reasoned, it made most sense to have the court of appeals review its interpretation of the new trial standard before putting the parties to the expense and time of a new trial.[25]

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[18] Argument Transcript of United States v. Schay at 19.

[19] *Id.* at 20.

[20] *Id.* at 26.

[21] *Id.* at 35-36.

The broader significance of this ruling cannot be fully appreciated without a proper understanding of the historical and social context from which it arises. It is evident from the most cursory review of the record that the all-white jury in *Schay* deprived the plaintiff "of the verdict to which he . . . was entitled."[26] Yet this is not the first time that a Southern jury in a civil rights case was simply determined to acquit regardless whether "the guilt of the defendants . . . was hardly in doubt or dispute."[27] Concern over the danger that jury nullification poses to enforcement of the civil rights laws first arose long before

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[22] United States v. Schay, 746 F. Supp. 877, 882-85 (E.D. Ark. 1990). As the case was being prepared for submission to the jury, the defendants — evidently concurring with the court's assessment of Daley's performance — sought desparately to distance themselves from their "alibi" witness. Despite Schay's testimony that "Frank Daley contends that he is that person [to whom the apartment was rented] and I have no reason to doubt that," the defendants requested that Daley's name be stricken from an instruction referring to Daley as the person to whom Schay allegedly rented the apartment. *Id.*

[23] *Id.* at 885.

[24] *Id.* at 882.

[25] *Id.* at 886.

[26] Curtis v. Loether, 415 U.S. 189, 198 (1974).

[27] 103 Cong. Rec. 8490 (1957) (remarks of Congressman Celler).

Schay.

II. FEDERAL CIVIL RIGHTS LEGISLATION AND THE DEBATE OVER JURY NULLIFICATION

Since the 1930's Congress has voiced concern over the use of jury trials and the effective enforcement of federal civil rights laws. That concern is reflected in congressional debates and committee reports stretching back nearly two generations. A brief review of the legislation that triggered these debates provides an important and useful historical perspective on the central issue raised in the *Schay* appeal.

In the late 1930's, federal legislation was proposed to combat the lynchings taking place throughout the South.[28] The legislation provided for civil damage actions against officials who failed to prevent lynchings. The bill was strongly opposed by several senators on the grounds that Southern juries would refuse to enforce the law.[29] Senator Bailey's remarks on the floor of the Congress characterized the deep concern held by many:

> I say to the Senate that when that kind of suit is brought, in the first place, the jury in the county is not going to bring in a verdict for the Attorney General of the United States. Oh no. We are not going to think of doing such a thing . . . . I have tried cases for 25 years in the United States and in the State courts of North Carolina, and I have never known any difference as to juries. They are a fine body of men in either court, but they are men who have a sense of loyalty to their locality and a sense of loyalty to their people.[30]

The anti-lynching bill died in Congress.

Ten years later, in 1949, concern over jury prejudice surfaced again when Congressman Powell, a representative from New York, proposed a Fair Employment Practices Act designed to eradicate racial discrimination in employment.[31] The enforcement mechanism for the Act was left to a proposed Fair Employment Practices Commission, similar to the National Labor Relations Board. A commission structure was chosen in part because "commission procedure avoids the necessity of criminal penalties which juries hesitate to invoke."[32] Ultimately this initiative collapsed in the Senate.

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[28] R. 1507, 75th Cong. 2d Sess (1937).

[29] 82 Cong. Rec. 77 (1937) (Remarks of Senator Bailey); 83 Cong. Rec. 141 (1938) (Remarks of Senator Borah).

[30] 82 Cong. Rec. 77 (1937).

[31] H.R. 4453, 81st Cong. 2nd Sess (1950).

During the debates leading up to the passage of the Civil Rights Act of 1957,[33] Attorney General Brownell sought civil rather than criminal sanctions in order to avoid jury trials.[34] Those in support of the bill argued that jury trials would effectively nullify enforcement of the legislation. Numerous instances were cited in which juries in Alabama, Tennessee, Louisiana, and other Southern states had refused to indict or convict white defendants charged with civil rights violations.[35]

The proposed Civil Rights Act of 1960 did not provide for jury trials for contempt for the same reasons asserted in the 1957 debates.[36] Similarly, the debate over the right to a jury trial in contempt actions under the Civil Rights Act of 1964 raised the same concerns aired in the 1957 debates.[37] Ultimately Congress granted a right to a jury trial in a contempt proceeding under the 1964 Act, but denied the right to a jury trial in a civil action alleging employment discrimination.[38]

The Congressional debate that raged over the initial legislative drafts of what later became the Fair Housing Act of 1968 reveals precisely the same concern about Southern jury nullification. Testifying before the Senate in 1966, Attorney General Katzenbach stated that the proposed Fair Housing Act of 1966[39] would not provide for a jury trial.[40] The reason for this opposition was concern "about the capacity to recover from a jury."[41] Other proponents of the proposed fair housing legislation echoed the Attorney General's concern about Southern juries. Illustrative are the comments of Representative William F. Ryan of New York:

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[32] 96 Cong. Rec. 2168 (1950) (remarks of Representative Powell).

[33] Civil Rights Act of 1957, Pub. L. No. 83-315, 71 Stat. 634 (1957); *see* 28 U.S.C. §§ 1343, 1861; 42 U.S.C. §§ 1971, 1975-75e, 1995 (1988).

[34] 102 Cong. Rec. 13141 (1956).

[35] *See, e.g.*, 103 Cong. Rec. 8488-8490 (1957) (Remarks of Congressman Celler) (citing a case in which an all-white Alabama jury acquitted two white defendants where their guilt was "not in dispute"); *Id.* at 12905-12907 (Remarks of Senator Javits) (citing cases in Alabama and Tennessee to illustrate how jury trials would render bill "meaningless"); *Id.* at 12845-12850 (Remarks of Senator Case). *Id.* at 12804 (Remarks of Senator Douglas) (". . . at the termination of their service [Southern juries] must go back into the communities from which they came and be exposed to all the social, economic and at times physical pressures which may be brought to bear . . . . [Judges] are somewhat insulated from the passions and prejudices of the community").

[36] *See, e.g.*, 106 Cong. Rec. 7241 (1960) (remarks of Senator Clark).

[37] *See, e.g.*, 110 Cong. Rec. 1993 (1964) (Remarks of Congressman Taft) *Id.* at 2266; (remarks of Congressman Gilbert); *Id.* at 8660 (remarks of Senator Morse); 9818 (remarks of Senator Javits); *Id.* at 12958 (remarks of Senator Humphrey).

[38] 42 U.S.C. § 2000e-5, 2000h (1988).

> In our free society, no right is more precious than the right to a fair trial. George Washington called the administration of justice 'the firmest pillar of government.' He was quite right. Yet as civil rights cases [in the South] have illustrated . . . in some sections of the country the temple of good government has no judicial pillar at all.[42]

Commenting on the racial discrimination that pervaded the selection process for grand and trial juries, Representative Diggs observed that Southern juries tended to be "predominantly male, white, middle-aged, middle-minded and middle-class."[43]

The Fair Housing legislation that was finally passed in 1968 did not contain a provision providing for a jury trial in civil actions brought to enforce the Act. Ultimately the Supreme Court ruled in *Curtis v. Loether*[44] that the Seventh Amendment required a jury trial in actions arising under the Fair Housing Act of 1968. The Court's decision was based solely on constitutional grounds. In light of what the Court viewed as the "clear command" of the Seventh Amendment, little consideration was given to an analysis of Title VIII's legislative history.[45] Recognizing that the legislative history of Title VIII was less than clear on the point, the Court did, however, note that the Act's supporters "were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil rights damages actions."[46]

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[39] 112 Cong. Rec. 9390-91 (1966).

[40] *Civil Rights, Hearing Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 2, 1178 (1966).

[41] *Civil Rights, 1966, Hearings Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess., 1183 (1966) (remarks of Attorney General Katzenbach).

[42] *Id.* at 1321; *see also id.* at 1331 (remarks of Congressman Diggs); *Id.* at 1142 (remarks of Roy Wilkins); *Id.* at 1519 (remarks of Whitney Young).

[43] *Id.* at 1331.

[44] *Loether*, 415 U.S. 189 (1974).

[45] *Id.* at 192, 198.

This reference in *Loether* to congressional concerns about the possibility of jury prejudice merely serves to underscore the persistent concern about jury nullification that marked congressional debate over civil rights legislation from the 1930's to the 1960's. The fact that the Court ultimately concluded that a right to a jury trial existed under Title VIII does not detract from the plain message suggested by these debates. That message is clear: where civil rights legislation includes a right to a jury trial, the danger of jury nullification — particularly in Southern jurisdictions — cannot be ignored. The danger to the statutory enforcement scheme is omni-present, and it is incumbent upon the federal judiciary, who "are somewhat insulated from the passions and prejudices of the community,"[47] to safeguard the integrity of the legal process.

III. The Importance of Motions for New Trial and JNOV as a Bulwark Against Jury Nullification

The Federal Rules of Civil Procedure provide two obvious procedural methods of redress for parties who have been victimized by a biased jury. Federal Rule of Civil Procedure 59 allows a district court to grant a new trial to any or all parties, and Federal Rule of Civil Procedure 50 entitles the court to set aside a jury verdict upon a motion for judgment notwithstanding the verdict.[48] Both of these protections against jury nullification are premised on the assumption that circumstances may arise in which an independent and insulated federal judiciary may have to serve as a bulwark against jury prejudice.

Although in *Loether* the Supreme Court found it unnecessary to reach the issue of Title VIII's legislative history with respect to the right to a jury trial, the Court expressly acknowledged the policy concerns raised by the specter of biased juries, and recommended reliance on a motion for new trial or JNOV as a protective measure:

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[46] *Id.* at 191-92.

[47] 103 Cong. Rec. 12804 (1957) (remarks of Senator Douglas).

[48] Fed. R. Civ. P. 50 has been recently amended. A judgment notwithstanding the verdict (JNOV) is now referred to as a "judgment as a matter of law." For purposes of this discussion, what is now termed in the amended rule as a "judgment as a matter of law" will continue to be referred to as a judgment notwithstanding the verdict.

> We are not oblivious to the force of petitioner's policy arguments. . . . We recognize . . . the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled. Of course, the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial provides substantial protection against this risk . . . .[49]

The need for protection against biased juries has not diminished since 1974 when *Loether* was decided. To the contrary, the need for protection — particularly in the deep South — may remain as essential as ever. Case statistics maintained by the Administrative Office of the Courts suggest that defendants may have a greater likelihood of prevailing before a jury in a fair housing or public accommodations case in the deep South than elsewhere in the country.

During the last twelve years,[50] a total of 115 jury verdicts were rendered in fair housing or public accommodations cases in the country as a whole.[51] Of that number, defendants prevailed in sixty-five cases. The success rates for defendants on a national level since 1979, therefore, has remained constant at roughly fifty-six percent. During that same period, however, the success rate for defendants in the combined deep South states of Louisiana, Arkansas, Texas, Mississippi, and Florida has been significantly higher. In those Southern states defendants have prevailed in eighty-three percent of the cases decided by a jury. A total of six jury cases have been tried in these states during the last twelve years; five resulted in defendants' verdicts.

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[49] *Loether*, 415 U.S. at 198.

[50] This twelve-year period represents all of the years for which the Administrative Office of the Courts currently has statistics on fair housing jury trials available.

[51] The data upon which this statement, and the statements that follow, are based is taken from computer analyses performed by the Administrative Office of the Courts and provided upon request to the Washington Lawyers' Committee for Civil Rights Under Law. The data compilations are currently on file with the Washington Lawyers' Committee.

This success rate for Southern defendants in jury trials is also considerably higher than the national average for defendants in non-jury fair housing and public accommodations cases. During the five years from 1986 to 1990, the only years for which non-jury statistics are currently available, defendants prevailed in the nation as a whole in sixty percent of the fair housing or public accommodations cases that were tried without a jury.

The statistics with respect to non-jury trials underscore a different point as well. The recent trend in non-jury fair housing and public accomodations adjudications increasingly favors defendants. From 1986 to 1990, defendants' success rates in non-jury cases increased from 51% to 72%. The rise has been steady, increasing from 51% in 1986 to 55% in 1987, 56% in 1988, 64% in 1989, and 72% in 1990. During the same five year period, jury trial outcomes across the nation as a whole showed no distinctive trend. On balance, defendants' success rate in jury trials during that period averaged slightly less than 50%.

All of these statistics suggest two points. First, although the difference between the success rate for defendants in the South and across the nation as a whole clearly does not prove that jury nullification has occurred in recent years in the deep South, the disparity may well suggest that Congress' concern about nullification is still timely and relevant.

Second, the statistics indicate that on a national level plaintiffs are finding it increasingly difficult to win bench trials, while success with jury trials in recent years has remained roughly constant. To the extent that this trend creates an incentive for plaintiffs to rely increasingly in the future on juries as the fact-finder,[52] the threat to Southern plaintiffs posed by jury nullification becomes that much more acute.

Viewed in this way, the numbers underscore the importance of crafting a new trial standard that is sensitive to Congress' concern about jury nullification in Southern jurisdictions. In practical terms, that means that appellate courts must impose a new trial standard that gives district courts sufficient discretion to prevent biased juries from depriving "a victim of discrimination of the verdict to which he or she is entitled."[53]

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[52] One possible conclusion to be drawn from these statistics is that the trend in favor of defendants' verdicts in bench trials is directly related to the increasingly conservative cast of the federal judiciary. That would explain the growing disparity in the success rates of defendants in bench and jury trials respectively. If this assumption is correct, (and assuming the judge's proclivities with respect to fair housing issues are not readily apparent), as a general matter plaintiffs would appear to have an increasing incentive to request a jury trial.

The statistics also serve to highlight the timeliness of the review of new trial and JNOV standards advocated here. The statistics reveal that since 1979 comparatively few private fair housing suits have gone to trial before Southern juries. As noted in the Introduction, all that is about to change. *Schay* represents the advent of a new era in which the Department of Justice will be prosecuting HUD complaints before juries across the South. The manner in which appellate courts, like the Eighth Circuit, address these standards will likely have a significant bearing on the future success of government enforcement efforts in the deep South states.

While, as noted above, the statistics do not prove that jury nullification has occurred in any one case, when reviewed in conjunction with the facts and verdict in *Schay*, the pattern of defendants' verdicts in deep South jurisdictions is troubling.

Jury nullification clearly occurred in *Schay*. That fact is clear from the blatant appeal to Southern regional pride made in closing argument, and from the shocking facts themselves. Despite the fact that the sole alibi witness was thoroughly impeached and discredited with respect to both his reputation for truthfulness and the substance of his story; that the defendant real estate agent admitted changing her story three times during the course of the litigation to conform to the "magical appearance" of the alibi witness just weeks before trial; that at the conclusion of trial the defendants attempted desperately to distance themselves from their own alibi witness; and that the apartment in question stayed vacant for months after the incident with no effort made to contact Melvin White, the jury took only minutes to rule for the defendants.

The all-white *Schay* jury was determined to acquit the defendants regardless of the facts. It is precisely this type of nullification, occurring in a civil rights case in a deep South state that concerned Congress. The facts and verdict in *Schay* offer a unique insight into what appears to be an alarming statistical pattern in other deep South states, and in so doing bring these "cold numbers convincingly to life."[54] Taken together, the facts of *Schay* and the statistical evidence underscore the importance of defining a new trial standard that provides trial courts with sufficient discretion to remedy the type of jury nullification witnessed in *Schay*.

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[53] *Loether*, 415 U.S. at 198.

IV. FASHIONING A NEW TRIAL STANDARD THAT PERMITS LOWER COURTS TO REMEDY INSTANCES OF NULLIFICATION WITHOUT INTRUDING ON THE PROVINCE OF THE JURY

Fashioning a new trial standard that is responsive to Congress' historic concerns about the dangers of jury nullification and the current realities of litigating housing discrimination cases in the deep South states is not a simple task. As a general matter, protection against nullification requires that trial courts have broad discretion in reviewing a motion for new trial to weigh the evidence and assess credibility. Determining how to exercise that discretion in a particular case is not a matter that is capable of reduction to a precise formula.

It is possible, however, to define certain basic guidelines that courts of appeal, like the Eighth Circuit, must establish for trial courts if motions for new trial are to serve as an effective bulwark against the kind of jury nullification that unjustly left Melvin White without relief. Before discussing these guidelines, two points need be addressed. First, it is essential that trial courts understand the nature and basis for the two very different standards that govern motions for JNOV and new trial. Second, the fundamental tension between the jury's responsibility to find the facts, and the trial court's power to set those findings aside, requires exploration and clarification.

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[54] Teamsters v. United States, 431 U.S. 324, 339 (1977).

A. Distinguishing Between Standards for JNOV and New Trial

Because motions for JNOV and new trial are frequently filed simultaneously, courts chronically confuse the proper standards to apply in evaluating the two motions.[55] On a motion for JNOV, a trial court may not grant the motion "[i]f there is substantial evidence presented at trial to create an issue for the jury."[56] Stated slightly differently, the court must determine "whether the evidence and justifiable inference most favorable to the prevailing party afford any rational basis for the verdict."[57] If there is "substantial evidence . . . of such quality and weight" that reasonable persons "in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party," the motion must be denied.[58] The court must view the evidence in the light "most favorable to the verdict-winner," and the fact that the evidence is in conflict "is not enough to set aside the verdict."[59]

On a motion for new trial, however, the trial judge must:

> evaluate all significant evidence, deciding in the exercise of his own best judgment whether the jury has so disregarded the clear weight of the credible evidence that a new trial is necessary to prevent injustice.[60]

The trial court may weigh the evidence and evaluate the credibility of the witnesses. The court "has a duty" to grant a new trial "even though it is supported by substantial evidence 'if . . . the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice.' "[61]

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[55] *See, e.g.*, Giblin v. Beeler, 396 F.2d 584, 588 (10th Cir. 1968); Carroll v. Seaboard Air Line R. Co., 371 F.2d 903, 904 (4th Cir. 1967); Meeker v. Rizley, 346 F.2d 521, 525-26 (10th Cir. 1965); United States v. Hess, 341 F.2d 444, 447 (10th Cir. 1965); Jones v. J. P. Stevens & Co., 328 F.2d 428 (5th Cir. 1964); Wachovia Bank & Trust Co. v. United States, 288 F.2d 750, 757 (4th Cir. 1961); White v. New York Life Ins. Co., 145 F.2d 504, 508 (5th Cir. 1941); Collins v. Craven, 52 F.R.D. 146, 148 (D.S.C. 1971).

[56] Landes Construction Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987).

[57] Berndt v. Kaiser Aluminium & Chemical Sales, Inc., 789 F.2d 253, 258 (3rd Cir. 1986), (quoting Zegan v. Central Railroad Company of New Jersey, 266 F.2d 101 (3d Cir. 1959)).

[58] Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (1980).

[59] 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 43-44 (1973).

[60] *Berndt*, 789 F.2d at 258 (quoting Zegan v. Central Railroad Company of New Jersey, 266 F.2d 101 (3d Cir. 1959)).

The reason for this difference in the two standards of review lies in the fact that the granting of a JNOV, unlike a motion for new trial, represents the final decision in a case. It requires the court not just to vacate the jury verdict, but to reverse it. Indeed, in one sense the granting of a motion for JNOV actually "deprives the parties of a jury determination."[62] It is logical, therefore, that a more invasive motion should be measured by a more rigorous standard.

The manner in which these two standards have been confused by the courts is evident from the lower court's ruling in *Schay*. The district court did not believe the defendants' witnesses and concluded that the jury's verdict constituted a "miscarriage of justice." Yet the court did not find the evidence so overwhelming as to conclude that *no* reasonable juror could side with the defendants. This distinction — while enough to deny a motion for JNOV — is not sufficient to deny a motion for new trial. The court, however, confused the two standards and ultimately merged them, holding that it could not weigh the evidence or assess witness credibility on a motion for new trial. Blurring the standards in this way proved to be an error of no small consequence for plaintiff Melvin White. The end result was to strip a deserving plaintiff of an essential means of protecting himself from the racially motivated jury nullification that occurred. Plainly this result is not what Congress intended when it passed the Fair Housing Act.

The detrimental ramifications of failing to distinguish between these two standards are not limited to *Schay*. The use of a JNOV standard for new trial motions would severely compromise a trial judge's ability to combat jury nullification. Most civil rights cases are brought under a disparate treatment theory.[63] This theory requires a finding of intent. Intent, in turn, rests largely on credibility determinations about parties and key witnesses that are highly subjective. If the lower court were required to use a JNOV standard on a motion for new trial, few cases of nullification could or would be redressed. While the lower court might find that the overwhelming weight of the evidence strongly suggested a miscarriage of justice by a biased jury, under a JNOV standard the trial judge theoretically would be barred from weighing the evidence, assessing witness credibility, and granting a new trial, if it found that one juror could have concluded that a key witness was credible. It is a rare civil rights case that would ever meet this standard, for it is difficult to find a situation where *no* reasonable juror could conclude that a particular party or witness was or was not credible. To adopt such a standard would encourage toleration of jury nullification in a manner that is wholly inconsistent with the desires and concerns of Congress, and would only insure that other injured and deserving plaintiffs, similar to Melvin White, would also be left without redress.

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[61] *Wyatt*, 623 F.2d at 891-92 (quoting Williams v. Nichols, 266 F.2d 389, 392 (4th Cir. 1959)).

[62] Birchfield v. International Harvester Co., 726 F.2d 1131, 1132 n.1 (6th Cir. 1984) ("The trial court has greater discretion in deciding whether or not to grant a new trial than is present in the directed verdict or judgment notwithstanding the verdict context. The former does not deprive the parties of a jury determination and is thus viewed with less scrutiny upon appeal."). *See also* 9 C. WRIGHT & A. MILLER, *Federal Practice and Procedure* § 2531 at 575 (1971).

B. Protecting the Province and Integrity of the Jury

Historically, the wide discretion accorded courts to weigh the evidence and assess credibility when evaluating a motion for new trial is closely linked with the court's perceived duty "to prevent a miscarriage of justice:"

> [The court] may . . . set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice.[64]

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[63] *See* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 and n.15 (1977).

[64] United States v. Garrison, 62 F.2d 41, 42 (4th Cir. 1932).

It is this role of the court as the ultimate protector of the integrity of the judicial process that forms the fundamental distinction between JNOV and new trial standards. While a verdict can be directed "only where there is no substantial evidence to support recovery by the party against whom it is directed," a verdict may be set aside and a new trial granted "whenever in the exercise of sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice."[65]

The reason for this level of discretion in granting a motion for new trial rests on the belief, articulated clearly at common law, that a trial judge "does not sit to approve miscarriages of justice," and thus must have the ability to grant a new trial in those instances where he or she "on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[66] It is the availability of a new trial, therefore, not a JNOV, that provides the final safeguard for a party who has been deprived of the basic elements of a fair trial.

The use of this discretion to protect against a miscarriage of justice is not inconsistent with the right to a jury trial, nor need the exercise of that discretion usurp, denigrate, or interfere with the jury's function. To the contrary, the granting of a new trial "involves an element of discretion which . . . . embraces all the reasons which inhere in the integrity of the jury system itself."[67] By correcting the mistakes of jurors, the cautious exercise of this discretion "safeguards the right to a jury trial by . . . ensuring the integrity of our judicial system and promoting esteem for the jury system in the eyes of the public."[68]

The point here is a simple one. Courts have long recognized that there is no inherent conflict between a court's exercise of discretion in weighing evidence on a motion for new trial and the protection and exercise of a party's seventh amendment right to trial by jury. Rather, it is the reverse; failure to exercise that discretion to protect against a miscarriage of justice denigrates the jury system by impeaching its integrity. That is precisely what happened in *Schay*. The difficulty arises not in concluding that a trial judge must possess the discretion to protect against this type of miscarriage, but in determining precisely when and how to exercise that discretion.

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[65] *Id.*

[66] 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 49 (1973).

[67] Tidewater Oil Co. v. Waller, 302 F.2d 638, 643 (10th Cir. 1962).

[68] Bevevino v. Saydjari, 574 F.2d 676, 686 n.29 (2d Cir. 1978); *see also* Tidewater Oil Co. v. Waller, 302 F.2d at 642-43; Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 352-54 (4th Cir. 1941); Felton v. Spiro, 78 F. 576, 581-83 (6th Cir. 1897); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 49 (1973); C. Wright, *Law of Federal Courts* § 95 at 468 (3rd ed. 1976).

C. *Defining a New Trial Standard*

For a new trial standard to serve as an effective bulwark against jury nullification it must provide trial judges with sufficient discretion to weigh evidence and assess witness credibility. That much is clear. As discussed above, creating a precise formula to guide the exercise of that discretion is neither practical nor possible. Certain basic guidelines, however, can and should be established for the benefit of district courts.

First, courts of appeal must make clear that in evaluating a motion for new trial, "[t]he judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not."[69] This duty should be the primary one in reviewing a motion for new trial. If this obligation is taken seriously, most instances of clear jury nullification, such as that found in *Schay*, will not result in judicial confusion of JNOV and new trial standards. Indeed, had the lower court in *Schay* understood this point, a new trial would have been ordered, for the court clearly believed that a miscarriage of justice had occurred.

Likewise, the miscarriage of justice standard must not be one that is so difficult to meet and so rarely invoked that it becomes a shibboleth without meaning. Courts must not hesitate to set aside a verdict under this standard where review of the record and the verdict suggests that nullification has occurred. Reserving invocation of the miscarriage of justice standard for only the most extreme cases will, as in *Schay*, serve ultimately to lower the public's esteem for the jury system.

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[69] *Saydjari*, 574 F.2d at 684, (quoting 6A *Moore's Federal Practice* ¶ 59.08[5] at 59-160, 161 (1973)).

Second, trial courts should be encouraged to exercise their discretion to examine the record with particular care in instances where the indicia of nullification are present. The point here is not to create a more "liberal" standard for granting new trial motions in fair housing cases, but rather to increase a trial court's awareness and sensitivity to types of cases and settings where historical precedent suggests nullification is likely to occur. As discussed in parts II and III *supra*, civil rights cases brought in certain deep South jurisdictions — and fair housing cases in particular — are one type of case where heightened sensitivity would be justified, but they are clearly not the only such cases. Surely, though, it is not necessary to identify every type of case where closer scrutiny would be appropriate to recognize that heightened attention to civil rights cases in Southern venues is both consistent with congressional intent and warranted by empirical data.

As a general matter, indicia of nullification might include the following: (1) the presence of particular claims in a case, such as allegations of race discrimination, that have historically resulted in jury nullification; (2) venue in a jurisdiction that has a history of local hostility to the enforcement of the statute in question, and a history of hostility in particular to enforcement by a prosecuting party from outside the jurisdiction; (3) the existence of statistical evidence indicating a pattern of verdicts in favor of a particular party that deviates significantly from the pattern of outcomes in other areas of the country or across the country as a whole; (4) an unusually quick jury deliberation resulting in a verdict at odds with the weight of the evidence; and (5) extensive media coverage of a case in the jurisdiction where it is tried, resulting in strong public sentiment in favor of one party.

Third, trial courts must understand that the broad discretion afforded by Rule 59 to weigh the evidence and assess credibility does not translate into a purely deferential standard of review on appeal. Courts of appeal, like the Eighth Circuit, must make it clear that they will reverse denials of motions for new trial where the lower court concludes that it may not weigh the evidence or assess credibility; where the court weighs the evidence against the wrong standard; or where the trial judge concludes that the jury's verdict is against the clear weight of the evidence but nevertheless refuses to grant a new trial.

Finally, it is imperative that trial courts understand the distinction between a verdict that is at odds with the clear weight of the evidence and "against the right and justice of the case,"[70] and a verdict that would not constitute a miscarriage of justice if left untouched, but is not a verdict with which the court agrees. Just as the latter situation would not support a motion for JNOV, it also will not support a motion for new trial. It is this fine line between unjust results and results with which the court does not agree that separates protection of the integrity of the jury from impermissible interference with the province and function of the jury.

In the end, the touchstone is the protection of the integrity of the jury in the eyes of the public. Where the trial court abuses its discretion under Rule 59 randomly to substitute its views for that of the jury, the jury's traditional role has been usurped. But where the trial court reserves the use of its power to set aside verdicts only for those situations — such as *Schay* — where to do nothing would be to violate the adage that a trial court "does not sit to approve miscarriages of justice,"[71] the jury's function has been bolstered. The exercise of the new trial powers of the court in this situation does not "derogat[e] the right of trial by jury but . . . [constitutes] one of the historic safeguards of that right."[72] By exercising its powers in this manner, the trial court will ensure that it provides the type of powerful and effective bulwark against jury nullification that Congress envisioned, without undermining the very system it is endeavoring to protect.

CONCLUSION

The symbolic importance of *United States v. Schay* cannot be overstated. The case is significant not just because of the shocking miscarriage of justice that took place, but also because the trial over which the lower court presided represents the first of what will be many housing discrimination jury trials brought by the Department of Justice in the South.

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[70] Reid v. Maryland Casualty Co., 63 F.2d 10, 12 (5th Cir. 1933).

[71] 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 49 (1973).

[72] Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350, 353 (4th Cir. 1941).

The Eighth Circuit is now faced with a unique opportunity to craft and clarify a Rule 59 new trial standard that will provide lower courts with the means to protect victims of discrimination, like Melvin White, from being deprived of "the verdict to which [they] . . . [are] entitled."[73] How it fashions that standard will greatly affect the ability of the government and private fair housing plaintiffs to enforce their rights in areas of the country that have been historically hostile to civil rights litigation.

In defining the new trial standard, courts of appeal like the Eighth Circuit should be mindful of Congress' longstanding concern over jury nullification in civil rights cases, and take notice of the realities of civil rights litigation in certain historically hostile jurisdictions. For a new trial standard to serve as an effective bulwark against jury nullification it must provide lower courts with wide discretion to weigh evidence and assess credibility, but at the same time it must also provide clear guidelines to assist trial courts in understanding the critical distinctions between motions for JNOV and new trial. The indicia of nullification identified in this article will assist in this task, but plainly there is no formula that can be relied upon to identify each and every such instance with certainty.

In the final analysis, the facts of *Schay* provide as good a benchmark as any. To allow the verdict in that case to stand would plainly erode the integrity of the judicial system. It is that basic standard — one grounded in common sense notions of equity and fair play — that ultimately must guide the exercise of lower court discretion.

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[73] *Loether*, 415 U.S. at 198.

DEVELOPING A HOUSING PLAN FOR MISSISSIPPI: SOME PROGRAM AND FUNDING ALTERNATIVES

Almost everyone in Mississippi recognizes that this state has a serious problem in that a large section of the state's populace cannot afford safe and decent housing. However, recognizing the problem is far easier than finding a solution.

Before the 1980's, any governmental assistance for housing in the United States was primarily funded by the federal government.[1] However, in the last ten years, many states have become increasingly involved in helping to provide housing to their citizens.[2] The reasons for stepped-up state interest include greatly reduced federal funding, a recent surge in state policy and program initiatives, and a recognition of the link between housing and more traditional public policy concerns such as economic development.[3]

Mississippi has some characteristics that will make it very difficult to follow the lead of other states in initiating state sponsored housing programs. First, of course, is lack of funds. In 1986, Mississippi's per capita income was $9716, which was only sixty-six percent of the national average.[4] This creates a two-fold problem. Mississippi's tax base and source of revenue is small, making for an extremely tight state budget. In addition, the state's low income levels reflect a population with many needs competing for the same dollars.

Second, Mississippi is a rural state with its greatest housing needs in the poorest and most sparsely populated areas. Conversely, the states which have pioneered housing programs in recent years are predominantlly urban and have greater financial resources available for housing problems.[5] States with needs and problems similar to those in Mississippi have, for the most part, failed to address the housing problem.[6]

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[1] COUNCIL OF STATE COMMUNITY AFFAIRS AGENCIES, STATE HOUSING INITIATIVES: THE 1988 COMPENDIUM 7 (1988) [hereinafter INITIATIVES]. "Before 1980, only 44 state-funded housing programs existed, primarily in California, Connecticut and Massachusetts." *Id.*

[2] *Id.* From 1980 to 1987 the states created 112 housing programs. *Id.*

[3] *Id.*

[4] HOUSING TASK FORCE, STATE OF MISSISSIPPI, A DECENT HOME FOR EVERY MISSISSIPPIAN 6 (1988) [hereinafter HOUSING TASK FORCE]. In addition, more than half of Mississippi's owner households and three-fourths of its renter households earned less than $22,000. *Id.*

For these reasons, housing solutions employed by other states may not be suited to Mississippi's problems. To address her housing needs, Mississippi must break new ground. She must be creative and take the initiative in developing a progressive new plan tailored to the needs of the state. As an introduction, the following is a description of various programs and funding methods to consider in developing a housing plan for Mississippi.

Housing Programs

Privatization

Privatization essentially means transferring governmental programs to the private sector.[7] In the past, most government-sponsored housing initiatives have been public housing programs. In these programs, the government supplied not only the funding, but also actually controlled the building and management of the projects. Conversely, private programs may be publicly funded, but call on the private sector to build, maintain, and manage the housing project, thus taking advantage of the efficiencies of the private capital market. There are three methods of privatization.[8] The first method is selling government assets.[9] The second, contracting out, occurs when the government enters into contracts with private firms to provide goods and services used by the government or demanded by the public.[10]

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[5] *See generally*, INITIATIVES, *supra* note 1, at 19-130 (compendium of state housing programs).

[6] *Id.* In this list of state housing programs, for the most part, rural states such as Mississippi, Alabama, Arkansas and South Carolina are conspicuously absent. *Id.*

[7] PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 1 (1988) [hereinafter PRIVATIZATION].

[8] *Id.*

[9] *Id.*

[10] *Id.*

The third method of privatization is the use of vouchers, whereby the government distributes purchasing power to eligible consumers, who then must spend the funds received on designated goods or services.[11]

Privatization may have relevant application to low-income housing needs in Mississippi. Methods one and two, transfer of assets and contracting out, are must efficacious in the area of ownership and management of public housing projects.[12] These projects are usually undertaken by the federal government, and any move toward privatization would probably come at the national level.

Privatization in Mississippi would be most effectively used in conjunction with the state's private rental market. This would be accomplished in large part through a housing voucher program, utilizing the third method of privatization. The housing voucher program is similar in nature to food stamps, in that the amount of the housing voucher varies with the income of the recipient.[13] In this program, the recipient may spend as much as she wants for housing.[14] She may supplement the voucher payment with her own funds or spend less, retaining a portion of the voucher payment for other uses.[15] The federal government has a similar program that is currently in place in Mississippi, the Section 8 certificate program of the Housing and Community Development Act of 1974.[16] It is less efficient than the housing voucher program because it has encouraged landlords to raise rents to a fixed allowable rent ceiling and required the tenants to spend the fixed amount on rent, refusing to allow them to purchase higher quality housing if rent exceeds the HUD ceiling.[17] This removes the incentive for tenants to search for a better housing bargain.[18] An example of this economic inefficiency may be seen in the Mississippi Delta. It is a common practice in the Delta for landlords to set rent at amounts above the market rate in order to take advantage of the HUD ceiling amount. However, insofar as it vests buying power and choice of housing in the tenant and utilizes the expertise and efficiency of the private market, the Section 8 program is a model of how successfully a similar voucher program may be employed by the state of Mississippi.

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[11] *Id.* at 2.

[12] Privatization, *supra* note 7, at 17-22. A move toward the privatization of public housing can include sale of units to tenants at a discount, sale of larger projects to tenant management organizations, and contracting out of management to private firms or tenant management organizations. *Id.* The Mississippi legislature has given housing authorities the power to contract for services and to work with private entities, as to sell, lease, transfer, assign, pledge, exchange, as well as or dispose of any real or personal property. Miss. Code Ann. § 43-33-11 (Supp. 1991).

[13] Privatization, *supra* note 7, at 14.

[14] *Id.*

[15] *Id.*

[16] *Id.*

Privatization of low-income housing rentals in Mississippi may further be accomplished through offering financial incentives to developers for offering rental complexes with a certain percentage of low-income units. This has been done on the federal and state levels through the use of tax credits and low interest loans.

Benefits of Privatization:

(1) The voucher system allows a recipient to choose his housing based on his personal values. It promotes efficiency in the market because of the tenant's ability to "shop around."

(2) Employing private developers and managers, both through the voucher system and through development incentives, utilizes a great resource already in the state and reduces administrative and start-up costs to the state.

(3) Use of privatization eliminates the large front-end investment necessary with most state-funded housing programs.

(4) Private citizens, especially those involved in some way in the housing industry, as well as legislators would be likely to view this program favorably because it involves less governmental administration, provides business to the private sector, and has lower initial cost.

(5) Use of private rental units avoids the stigmatization of public housing and avoids community reaction to a "visible" housing subsidy.

Problems of Privatization:

(1) Money expended in the program is not put back into the

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[17] *Id.*

[18] PRIVATIZATION, *supra* note 7, at 14.

program. Once the government funds or pays for a private service like building, maintenance, or management of low-income housing, those moneys flow into private hands. Although the poor do benefit from private housing programs, the groups most benefitted are landlords and developers. These are the ones who keep any profits and ultimately end up with investments in real estate that have been subsidized or completely paid for by government funds. Because these subsidies and rent payments do not stay in the project, any private program would have to be refunded every year and would never become self-sustaining.

(2) Many of Mississippi's problems are in rural areas and towns of less than 2500 people.[19] In these areas, gaining low-income housing through encouraging large, multi-unit developments is impracticable. Another serious problem in this area is the scarcity of vacant housing units.[20] The voucher program will be of little use in areas where there are no rental homes available.

(3) Programs which give developers financial incentives for offering a percentage of units to low-income tenants must allow for reversion of these units to the private market after a period of years in order to attract developers. Because of the large subsidies required for a program that offers only a portion of its units to the low-income and because the stock of low-income housing is only temporarily increased by these programs, these incentives have been judged an inefficient use of government funds by the President's Commission on Privatization.[21]

Nonprofits

Webster's defines "nonprofit" as "not intending or intended to earn a profit."[22] Given that broad definition, many diverse housing programs fall under the general description of "nonprofit." These programs range in purpose, scope, size and efficiency. In light of the move away from federally funded and administered housing programs, states may be attracted to these private organizations as sources of future housing initiatives.

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[19] HOUSING TASK FORCE, *supra* note 4, at 4.

[20] *Id.* at 5.

[21] *Privitization*, *supra* note 7, at 23.

[22] WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 371 (1971).

PUBLIC-PRIVATE PARTNERSHIPS

In dealing with their housing programs, several cities and states have begun to develop "partnerships" among public, private, and nonprofit entities.[23] These partnerships have been formed primarily in larger cities, and typically involve some mix of local businesses or corporate investors, community activists and the local government.[24] In this type of partnership, the government accesses funding sources, the private sector gets acceptable investment returns (with the government as guarantor) and community approval, and a community-based nonprofit organizations is seen as the "third partner."[25] All partners are part of the decision-making process. For example, the Chicago Housing Partnership represents the joint efforts of three groups: corporate investors who wish to show their commitment to the city, community activists and the banking community, led by Citicorp. This partnership has experienced dramatic success, and in its first two years had funds committed for more than a thousand housing units.[26] Although this idea has been used mainly for specific projects on a local level, participants in a state and local housing colloquy have envisioned this new partnership concept as operating on a state-wide basis.[27] If administered on such a scale, this innovative program would help a state like Mississippi develop a housing plan in an organized way by appealing to both public and private sectors.[28]

A STEP FURTHER

Given the condition of Mississippi's state budget and the appeal to its citizenry of a "grassroots" approach, Mississippi might consider taking this partnership concept one step further. The state itself would actually initiate the formation of a statewide nonprofit organization to operate through community branches. Furthermore, funding for the program could be linked to a housing trust fund and a revolving loan fund as described below. The purpose of this organization would be to solicit funds for housing programs and encourage local volunteerism and involvement in their administration. The state would provide a few highly skilled personnel to oversee all aspects of the program and provide training and technical assistance as well as additional funding.

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[23] NENO & COLYER, NEW STATE AND LOCAL INITIATIVES IN HOUSING AND COMMUNITY DEVELOPMENT: WHAT DO THEY MEAN FOR THE FUTURE? A COLLOQUY AMONG STATE AND LOCAL LEADERS, 3 (1988).

[24] *Id.* at 19-22.

[25] *Id.* at 3.

[26] *Id.* at 20.

[27] *Id.* at 3.

[28] NENNO & COLYER, *supra* note 23, at 3.

Benefits of Using Nonprofit Organizations

(1) Use of nonprofit organizations to help develop a comprehensive state-wide approach to low-income housing would enable the state to address its problems in a more orderly and thoughtful manner than if the state were relying totally upon legislative funding and approval of individual projects. Housing advocates agree that uncoordinated piecemeal development has a detrimental impact on housing efforts.[29]

(2) This is a method of involving low-income groups in the entire process and developing leadership among them. This is very important for any program, and Mississippi needs to involve the poor in the planning and decision-making process. With the large number of Mississippians living at the poverty level, a major problem is a feeling of powerlessness and a lack of direction. Developing leadership among this group is imperative in moving the state forward in the area of housing.

(3) Making use of local nonprofit organizations would encourage interest and involvement in the state's housing programs on the community level. This is vital for the development and sustenance of an effective and comprehensive state housing initiative because any long-term program must have a large base of support at the grassroots level to be successful.

(4) Employing volunteerism and private revenue sources is arguably the only way Mississippi will comprehensively address on a large scale the crushing housing needs of a large portion of its population.

(5) This kind of organization would facilitate a program that could organize and address Mississippi's various needs

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[29] *Id.* at 1.

including:

(a) building of affordable new housing for purchase by low-income people, especially in rural areas and small communities.

(b) rehabilitating substandard housing.

(c) offering rental units for low-income renters who are either unable or not ready to buy a home.

(d) provide counseling for those preparing for home ownership.

(6) A major benefit over subsidizing private development is that the money stays in the program. As rent is paid or homes are paid for, that money goes back into the hands of the nonprofit organization. The nonprofit organization is then able to reinvest the income in other low-income housing programs. In this way, the initial subsidy can be reused for future projects. Although front-end costs are typically larger for a nonprofit organization than with private development, the subsequent yearly funding necessary is in theory much smaller.

Problems with Using Nonprofit Organizations

(1) A program such as this would have a long start-up time to train workers and develop a network of support. This is because there are no programs comparable to this presently in place in Mississippi. Therefore, organizers would be starting at "ground zero" in every area. This can be compared to utilizing the private sector, where knowledge and expertise in the areas of building, management and maintenance have already been developed.

(2) Funding for the nonprofit organization could fluctuate from year to year, making it difficult to institute a cohesive, long-term plan.

(3) It is uncertain that large numbers of volunteers will be committed to the concept.

WARRANTY OF HABITABILITY

One tool used to attack the rental of substandard housing is the warranty of habitability. The recognition of such a warranty has been accomplished by the courts in some jurisdictions and by statutory decree in others. The Mississippi legislature recently passed a new housing law that provides for a warranty of habitability.[30] This warranty may be invoked by a tenant when he lives in quarters that do not meet local building code requirements[31] or when a landlord fails to repair something that was in working order when the tenant moved into the home.[32] However, in order for this warranty to be a part of Mississippi's program to provide adequate housing, the state must now institute statewide building codes. As it stands, this new legislation is of little effect because large parts of the state do not have building codes.

Benefits of a Warranty of Habitability

(1) It enables the low-income tenant to demand liveable housing and gives him a much stronger bargaining position with his landlord.

(2) The warranty addresses the problem of landowners in certain areas monopolizing the low-income housing rental market, offering substandard housing and charging more than the housing is worth.

(3) The warranty of habitability is a housing remedy that does not involve any cost to the government. It has the appeal of not requiring funding; therefore, taxes need not be raised.

Problems With the Warranty of Habitability

(1) Mississippi's statute did not specifically address the manner in which damages would be calculated. Landlords could be required to pay the difference in the value of the house if it were habitable and the value of the house as it is. This damage calculation could serve as a disincentive to renting the houses at all. If the landlords chose to take these substandard homes off the market, or, in some cases, even to repair them and raise the rent, many Mississippians would be without any form of shelter at all. Alternatively, if landlords were forced through injunctive relief to make all rental units habitable, many would raise the rent at the end of the lease term. This too would make a large portion of Mississippi's poorest citizens unable to afford any housing.

(2) Because use of the warranty of habitability requires,

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[30] MISS. CODE ANN. §§ 89-8-15, 89-8-23 (1991).

[31] *Id.*

[32] *Id.*

first, that the low-income tenant be aware of his rights and, second, that there be lawyers willing to represent him, this remedy may actually benefit very few low-income people.

SHARED HOUSING

Shared housing can be an affordable method of dealing with housing problems of the single-person, single-parent, elderly, and other small, non-traditional low-income households. It is "a living arrangement where two or more unrelated people occupy a home or apartment to their mutual advantage."[33] There are two shared housing models which Mississippi could employ. The "match-up" model involves "a home-provider (owner or renter) [who] shares extra space with a home-seeker in exchange for rent and/or services."[34] This model is especially suited to the state's elderly population. Three-quarters of Mississippi's elderly householders own their own homes.[35] However, many of the elderly are on fixed or limited income, making upkeep and maintenance expenses a major problem.[36] One solution to their cash-flow problem would be to match them with a suitable tenant in exchange for cash or services.

"Group-shared" residences are usually "sponsored by public or nonprofit agencies and involve three or more people living cooperatively in a single large dwelling."[37] Often these homes employ the services of a "group facilitator" to "discuss household policies, mediate conflicts, and otherwise facilitate the process of group living."[38]

CO-HOUSING

An idea which is closely related to shared housing is the relatively new concept of co-housing. Co-housing is a type of planned neighborhood which typically provides separate housing units for each family. These units are organized around shared facilities, usually consisting of common grounds for play yards, gardens, soccer fields, etc., and a common house which provides facilities for such things as common dining, day-care, laundries, playrooms, guest rooms, and sitting areas.[39] Co-housing projects seek to develop a sense of community, trying to recapture some of the benefits of living with extended family, a strong sense of neighborhood, and the care-giving provided when one parent typically was in the home. These projects recognize the changes taking place in our society and address the new problems created by today's hectic lifestyle and nontraditional families.

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[33] Myers, *Shared Housing: An Adaptable Affordable Housing Option*, 1989 J. HOUS. 297.

[34] *Id.*

[35] HOUSING TASK FORCE, *supra* note 4, at 4.

[36] *Id.*

[37] Myers, *supra* note 33, at 297.

[38] *Id.*

Benefits of Shared Housing

(1) This housing arrangement costs considerably less to develop and operate than other housing programs.[40]

(2) Shared housing is flexible and adaptable to many diverse populations and a wide variety of needs.

Problems With Shared Housing

(1) Although shared housing is a very good supplemental program, it meets specialized needs and cannot serve as comprehensive type plan to meet the housing needs of the state.

ZONING AND REGULATORY COSTS

Government land-use and development regulations are often barriers to affordable housing. The basic problem is that in many areas, excessive and unnecessary government regulation makes housing costs higher than they could be, and prohibit certain types of housing and housing programs completely.[41] This regulatory and affordability problem is most severe in urban areas, exclusive suburbs and areas experiencing rapid growth.[42] Because Mississippi is a rural state, its increased housing cost due to regulation and zoning is far below that of more urban or industrialized states. However, the following recommendation from the 1988 report of Mississippi's Housing Task Force indicates this is a real problem in the state.

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[39] Jane Holtz Kay, *A New Kind of Housing from How America really Lives*, McCall's, July 1990, at 52.

[40] *Cohousing: A Contemporary Approach to Housing Ourselves*, 1990 The Commonwealth 450.

[41] ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, "NOT IN MY BACK YARD" REMOVING BARRIERS TO AFFORDABLE HOUSING 4-5 (1991) [hereinafter "NOT IN MY BACKYARD"]. Examples of regulations which make housing more expensive are overly burdensome permitting and approval processes, fees charged to developers for the privilege of building, and zoning which requires a minimum lot size. *Id.* Examples of regulations which exclude certain housing are zoning ordinances prohibiting manufactured housing and the renting of part of one's home (home sharing). *Id.*

> A broad legislative statement should be passed which would encourage cities and counties to annually evaluate regulations and zoning provisions. This should become part of the corporation's yearly planning cycle as it is developed and implemented throughout the State. Site-delivered housing, i.e., HUD-code manufactured housing, modular housing, and panelized housing should be considered in developing this model zoning ordinance. The Mississippi Home Corporation may, as part of the yearly planning cycle, provide for review of any local refusal to grant permits for low-to moderate-income housing if that refusal is based on local zoning requirements.[43]

It has long been the tradition in the United States that regulations affecting land use be promulgated at the local level. This local control facilitates overly restrictive codes and ordinances that burden development and constitute barriers to affordable housing.[44] For this reason,[45] states must take "increased responsibility and oversight for the regulatory decision making processes of their constituent localities."[46] The Advisory Commission on Regulatory Barriers to Affordable Housing recommends that states should undertake a plan directed at removing these barriers.[47]

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[42] *Id.* at 4-6. In cities, the main expense involves building codes geared to new construction rather than to the rehabilitation of existing buildings. *Id.* The major expense in the suburbs is exclusionary zoning intent on preserving exclusivity. *Id.* In rapidly growing areas, regulations aimed at growth control increase housing costs. *Id.*

[43] HOUSING TASK FORCE, *supra* note 4, at 34.

[44] "NOT IN MY BACK YARD", *supra* note 41, at 1-1.

[45] *Id.* Local control encourages attitudes of exclusiveness (the "not in my back yard" mentality) and opposition to additional or different kinds of housing units. *Id.* With regulation mostly on a local level, "there is little counterpoise from governmental institutions that consider public welfare within a broader perspective." *Id.*

[46] *Id.* at 13.

[47] *Id.* at 13-14. Specific recommendations include review existing zoning and land planning systems and remove barriers to affordability, building code reform, and consoli-

LIMITED EQUITY OWNERSHIP AND COMMUNITY LAND TRUSTS

The primary objective of most housing program is to provide affordable housing. One area of concern to many housing advocates has been that of long-term affordability. In many types of programs involving a government or nonprofit organization supplying funds to subsidize housing costs, those subsidies are lost once they are expended. For example, providing vouchers for a tenant to use to pay rent to private landlords helps that tenant with his immediate need; however, once the funds are expended, they are lost. This principle also applies in the area of subsidizing home ownership. When an agency reduces the cost of buying a home either by offering it to the purchaser at a below-market cost or by providing the purchaser a reduced rate mortgage, the subsidy provided the home buyer is lost when he later sells his home for market value.

Low-income housing subsidies are really made up of two distinct subsidies. The first of these is the "direct" subsidy. This is the difference between the amount the low-income home recipient paid for use of the home and the amount the home cost. Another way to measure this subsidy is the amount the housing organization contributed towards the cost of the house. The second subsidy, which is theoretically lost when a home recipient sells for market value, is the "speculative" subsidy. This subsidy represents the amount by which the land has appreciated during the time it was held by the low-income home recipient. This subsidy can be major or nominal, depending on extrinsic factors in the market. In areas that have felt the impact of phenomenal inflation in the housing market, housing organizations have seen the need to control this subsidy. Housing purchased using their funds has been resold at great profit, and now exorbitant prices are limiting the housing stock these same organizations can purchase.

In an effort to retain that subsidy for future low-income home buyers, different groups have begun to explore innovative ownership methods. They involve methods of providing the low-income buyer with a way to buy a home while at the same time

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dation and streamline of the state's regulatory functions. *Id.*

limiting the purchaser's equity in that home. One type of restriction that has been used is a subsidy recapture provision. These provisions require the homeowner to repay any subsidies that have reduced the cost of her home at the time she sells it.[48] There are several approaches to subsidy repayment. They include dollar-for-dollar repayment of the original amount of the subsidy, repayment of the original amount plus accrued interest, allowing the source of the subsidy to claim a percentage of the appreciation, or reducing the subsidy to be repaid over time.[49]

Another restriction employed are resale price restrictions. These limitations can hold the resale price to the original purchase price or allow for adjustment according to a "resale formula."[50] These restrictions are commonly accompanied by preemptive rights, so that the sponsor may have the first opportunity to repurchase. The restrictions are also accompanied by occupancy and use restrictions, whereby the homes will be resold at the lower price to other low-income households.[51]

COMMUNITY LAND TRUSTS

One method of land ownership designed to control and recapture housing subsidies is a community land trust. "A community land trust (CLT) is a democratically controlled, community based, non-profit organization established for the purpose of removing land permanently from the speculative market and maintaining it as a community resource."[52] It challenges traditional ideas of real estate ownership by separating the ownership of property into ownership of the land and ownership of the buildings on the land.[53] The CLT "serves as trustee or steward in perpetuity of lands it controls . . . and offers community members long-term ground leases for their use of the land."[54] In other words, the CLT owns the land, and the leaseholder owns the home on it. If the leaseholder wants to move and sell any improvements, his lease with the CLT typically limits the amount of equity he may accrue and provides the CLT with the option to purchase and resell those improvements.[55]

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[48] INSTITUTE FOR COMMUNITY ECONOMICS, THE COMMUNITY LAND TRUST LEGAL MANUAL 2-2 (1991).

[49] *Id.*

[50] *Id.* at 2-3. There are three basic resale formulas. *Id.* "Itemized formulas" allow the price to be adjusted upward to reflects things like improvements and inflation. *Id.* "Indexed formulas" increase resale prices in proportion to increases in a designated index, such as median income. *Id.* "Appraised-based formulas . . . allow the owner to receive a stipulated percentage of appreciated value as measured by market appraisals." *Id.*

[51] *Id.* at 2-3, 2-4.

[52] MASSACHUSETTS ASSOCIATION OF COMMUNITY DEVELOPMENT CORPORATIONS AND CITIZENS' HOUSING AND PLANNING ASSOCIATION, LOOKING TO THE FUTURE: A REPORT ON MECHANISMS FOR PRESERVING THE LONG-TERM AFFORDABILITY OF PRIVATELY OWNED, PUBLICLY ASSISTED HOUSING IN MASSACHUSETTS, 20 (1990).

The Community Land Trust movement is relatively new, but has gained substantial momentum in recent years. One hundred twenty CLTs are in existence across the country.[56] These trusts are diverse, can be tailored to the needs of their individual community and have met with considerable success. One success story is the Covenant Community Land Trust in Orland, Maine. This trust, located on Maine's wooded northeast cost caters to low-income people. Over the course of ten years, the Covenant trust has built fourteen single-family farmhouses, three two-family houses and five units for the elderly, as well as refurbishing three homeless shelters.[57] The trust also operates a saw and shingle mill, which provides itself with building materials, income and creating new jobs.[58]

FUNDING

Housing Trust Funds

Generally, a housing trust fund is a "government-established fund, normally financed from a source other than general revenue, that is earmarked for low-and moderate-income housing."[59] This is a new approach for financing housing instituted by states and cities in response to mounting housing needs and reduced federal funding. Housing trust funds have been instituted across the country, with a large number located in the Northeast.[60] These funds are financed by a variety of sources including development linkage fees, real estate transfer taxes, deed recording fees, surcharge on property taxes and interest on real estate sales escrow accounts.[61] A Mississippi housing task force which convened in 1988 recommended that a housing trust fund be established in this state recommending the following sources of funding:[62]

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[53] *Id.* at 21.

[54] *Id.*

[55] *Id.* at 22.

[56] Waxman, Chi. Tribune, Nov. 10, 1991, at 1D.

[57] *Id.*

[58] *Id.*

[59] Connerly, *Housing Trust Funds: New Resources for Low Income Housing*, 1990 J. HOUSING 96.

1.Unclaimed deposits in inactive bank accounts[63]
2.Petroleum violation escrow receipts
3.General fund allocation
4.Proceeds from sale or lease of land (other than 16th section lands) owned by the state
5.Interest on real estate sale escrow deposits and security deposits[64]

Benefits of Housing Trusts

(1) One major advantage of a dedicated trust fund is "that it allows state or local legislators to make a longer term response to housing needs, bypassing the controversial, year-by-year funding debates."[65]

Most state-sponsored funding must be written into the budget on a yearly basis. Each state expenditure always faces strict scrutiny, but funding programs are in greatest danger in times like these, when resources are especially tight and many different groups are vying for the same tax dollar. A separate trust fund bypasses this yearly scrutiny; and is, therefore, assured greater security and longevity.

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[60] *Id.* at 97.

[61] *Id.*

[62] *Housing Task Force*, *supra* note 4, at 20.

[63] Presently, this suggestion cannot be implemented because it violates state law. Mississippi's Uniform Disposition of Unclaimed Property Act provides that all abandoned property is to be deposited in the "Abandoned Property Fund." MISS. CODE ANN. § 89-12-37 (1991).

[64] There is no provision in Mississippi for a landlord's security deposit account. However, the concept of the establishment of a separate account for those who hold other's money in trust is not novel; and some groups have used the interest on such accounts to benefit their communities. Lawyers, who are often placed in the role of fiduciary of their clients' money, have established IOLTA - Interest on Lawyers' Trust Accounts. Most IOLTA programs are voluntary. This concept allows attorneys who hold clients' funds short-term to place them in interest-bearing mediums and use that interest to fund public-service law projects. Baxter, *IOLTA—Helping You to Help Others*, 4 COMPLETE LAWYER 4 (1987). Mississippi, as well as most other states have an IOLTA program. *Id.*

[65] NENNO & COLYER, *supra* note 23, at 2.

Problems of Housing Trusts

(1) A significant administrative problem with housing trust funds is that sometimes the money does not come in at the right time for specified projects.[66] This is because income and revenues to the trust are tied to the particular funding vehicle chosen. For example, if the trust is funded by petroleum violation escrow receipts, a serious slump in the petroleum industry might call a halt to planned housing projects.

(2) Housing trust funds often face political pressure to distribute their funds to specific segments of the population based upon the amounts areas have contributed to the trust.[67] This method would be counterproductive, because the areas in greatest need would obviously have contributed the least.

TRANSFER OF PROPERTY TO THE HOUSING PROGRAM

As A Remedy for Breach of the Warranty of Habitability

Mississippi has recently enacted a statute which provides for a warranty of habitability.[68] However, the full range of remedies for breach have not yet been defined by the courts.[69] Mississippi has many rentals which do not meet even the most basic idea of what would be considered habitable. One suggestion for a remedy when a landlord has a property that is in breach of the warranty is to let him continue to let the property unless the tenant or a housing program wishes to buy it. If either offers to buy for fair value, the landlord would have to sell or take the unit off the market. The house could then be renovated to a habitable condition. This is one way to increase available safe and decent housing stock.

Benefits of Breach of Warranty Buy-Out

(1) This is a way to improve substandard housing and build equity in the low-income populate, not the landlord.

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[66] *Id.*

[67] *Id.*

[68] MISS. CODE ANN. §§ 89-8-15, 89-8-23 (1991).

[69] *Id.*

(2) This method of buying substandard housing provides a method of accruing a base low-income housing stock.

Problems with Breach of Warranty Buy-Out

(1) Landlords would provide strong opposition to any attempt at passage of legislation of this type.

(2) Opponents to any such legislation may make claims of unconstitutionality, based primarily upon the "public use" requirement of the fifth amendment for taking of private property. The United States Supreme Court dealt with a similar issue in the 1984 case *Hawaii Housing Authority v. Midkiff*.[70] In that case, the Hawaii Land Reform Act of 1967 had created a land condemnation scheme to take title and real property from lessors and transfer them to lessees in order to reduce concentration of ownership. The Supreme Court ruled that the fifth amendment was not violated simply because the property taken was transferred to private beneficiaries and that the government does not itself have to use the property to legitimize the taking. The Court further ruled that the Act did not violate either the due process or contract clauses of the Constitution. In light of the *Midkiff* holding, any legislative action in Mississippi could probably be designed to pass constitutional muster.

FORECLOSURE REFORM

Another suggestion for increasing available housing is a statutory redemption period following a foreclosure during which a nonprofit housing agency would be able to redeem the foreclosed property for the purchase price. The two basic types of foreclosure procedures in Mississippi are mortgage foreclosures and tax foreclosures. A mortgage foreclosure is done primarily through the use of power of sale foreclosure[71] which has minimal notice requirements and no subsequent redemption period available to the mortgagee. For this reason, the major bidder in a power of sale foreclosure is usually the beneficiary of the deed of trust who purchases for the amount of the indebtedness or less. In a tax foreclosure, the Mississippi statute does provide a redemption period during which the owner may redeem the property.[72] These properties also rarely produce an above market price. A statutorily imposed redemption period available to nonprofits, which would follow all other required procedures, might access a new stock of below market homes for purchase by housing programs in Mississippi. Furthermore, this is a housing subsidy that would come at no cost to the state.

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[70] 467 U.S. 229 (1984).

[71] Guthrie T. Abbott, *Some Basic Priority Problems In a Land Development Project In Mississippi With Emphasis Upon Power of Sale Foreclosure*, 50 MISS. L.J. 665, 677 (1979).

Use of State Land

One rich source of lands for low-income housing could be publicly-owned lands. Unused lands within the possession of the state could provide indirect funding for housing programs that would not impact the state budget.

Problem with Using State Land:

Article 4 Section 90 of the Mississippi Constitution of 1890 precludes the granting of any lands under state control.[73] This problem may be overcome by the state employing a form of trust, such as a community land trust. In this way, the state is not giving the land to a nonprofit organization. The state may retain ownership of the land, with individuals owning the homes located above it.

Mortgage Revenue Bonds

The tax exempt mortgage revenue bond has been widely used by state and local housing agencies to promote home ownership.[74] This method of funding is so popular that $11.8 billion in mortgage revenue bonds were issued in 1988 by state and local agencies.[75]

Advantages of Mortgage Revenue Bonds:

(1) "MRBs allow housing agencies to raise large amounts of money quickly for housing without affecting their tax rates, general obligation debt ceilings or operating budgets."[76]

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[72] Miss. Code Ann. § 21-33-61 (1972).

[73] Miss. Const. art. IV § 90(u) (1890).

[74] Loessberg, *MRBs: Effective Funding for Affordable Housing* 1991 J. Housing 181.

[75] *Id.* at 181.

[76] *Id.*

(2) This method can be assembled within sixty to ninety days.[77]

(3) Operating costs are minimal because the program is largely driven by the private sector.[78]

Problem with Mortgage Revenue Bonds:

The major disadvantage of these programs is that they usually do not reach the households that need assistance the most.[79] In fact, Mississippi's past experience with the issuance of this type of bonds bears that out. In a 1987 report to the legislature concerning the Mississippi Housing Finance Corporation, the Peer Committee reported that the "MHFC made fifty-one percent of its loans to residents whose adjusted gross incomes exceeded low and moderate levels. In addition, more than three-fourths of all MHFC mortgagors purchased houses with sales prices higher than the state adjusted median."[80]

Response to the Problem:

It is possible to design a program that will reach those in greatest need (those of low and moderate income who do not typically buy homes).[81] In order to do so, the most important design element is establishing income eligibility limits.[82] Most MRBs comply with the Federal Tax Code, which requires an income limit of 100 percent to 115 percent of an area's median income; however, a program focusing on truly low- and moderate-income should comply with the HUD definition of that term as "no more than eighty percent of an area's median income.[83] A program might have to adjust this percentage in some way should lenders complain that the limits are too low.[84]

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[77] *Id.*

[78] *Id.*

[79] Loessberg, *supra* note 74, at 181. A 1988 GAO study showed that most of those benefited are "white, young, one-to-two member households with incomes at or above the median level." *Id.* These characteristics represent the "typical American first-time homebuyer." *Id.* The conclusion of the GAO was that MRBs "serve mostly buyers who could afford homes anyway." *Id.*

[80] The Peer Committee, 60 *A Review of the Mississippi Housing Finance Corporation* 7 (Report to the Miss. Legislature 1987).

[81] Loessberg, *supra* note 74, at 188-89. Dallas County, Texas, designed such a program which was able to reach households which are not characteristically first-time homebuyers and the majority of which had an income of less than 80 percent of the area's median. *Id.*

[82] *Id.* at 182.

[83] *Id.* at 182-83.

If an MRB program is to serve a lower income group, it must also "have access to an adequate supply of potential buyers and sellers."[85] This means making the program available to a large geographic area; for a state like Mississippi, this may mean a state-wide program. Also, to insure such broad access it might be advantageous to market and advertise the program.[86]

It is important to point out that even in targeting a Mortgage Revenue Bond program in this way, extremely low-income people will not be served. "MRBs will still not be able to reach people at the poverty level; however, they will be able to reach those working class people who, while they are not poor, are certainly not middle class."[87]

PENSION FUNDS

Today, pension funds are the primary means of long-term savings for the American work force. There are now more than 45,000 pension funds in the United States, and their assets exceed $2.9 trillion.[88] But, only a fraction of that amount is invested in housing and real estate.[89] The direction of even a small portion of available pension money toward affordable housing plans would do much for funding of housing programs. Due to the nature of pension funds,[90] such funds could invest in affordable housing initiatives while continuing to offer "retirement plans with acceptable returns and long-term financial stability for participants."[91] This type of investment could further benefit plan participants in that the "investments create jobs and revitalize neighborhoods, stimulating the economics of local communities where pension contributors live and work."[92] This great resource and the benefits to both the pension plan and housing programs has begun to be recognized by both states and municipalities[93] as well as by private sector pension plans[94] who have put their pension moneys to work for affordable housing. In fact, the Home Builder's Association of Mississippi has recommended that the Mississippi State Employees Retirement funds might be invested in such a way as to encourage affordable housing.[95]

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[84] *Id.* at 184. This can be done by raising the limit to 90 to 95 percent of the area's median income or utilizing two sets of income limits and requiring lenders to reserve a portion of loans for the lower income guideline. *Id.*

[85] *Id.* at 184.

[86] Loessberg, *supra* note 74, at 185.

[87] *Id.* at 182.

[88] Ferlauto, *Pension Funds: An Affordable Housing Resource*, 1991 J. HOUSING 249.

[89] *Id.* at 249. "Currently, the top 1,000 pension funds invest less than four percent of their assets directly into housing and real estate. And, most of these funds go to high and commercial development projects." *Id.*

[90] *Id.* at 250-52. The return required by pension plans is less than that of prevailing bank rates. *Id.* In comparison to banks, pension plans have a lower cost of funds. *Id.* A pension system may rely on regular contributions; as opposed to banks, who "pay to borrow the funds they invest, [must] cover tax liabilities, and maintain liquidity through the secondary markets." *Id.* For this reason, the average rate of return achieved by pension funds is usually less than the prevailing bank interest rate. *Id.*

Advantages of Use of Pension Funds

(1) This method of funding is one of little cost to the state.

(2) Use of pension funds in this way yields good returns for the plan and benefits the local community.

Problems of Using Pension Funds

(1) Use of state pension funds are presently against Mississippi state law.[96]

(2) Such investments may not be competivie with more traditional investment strategies.

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[91] *Id.* at 250.

[92] *Id.*

[93] Ferlauto, *supra* note 88, at 252-53. The state of Connecticut has involved its State Employees' Retirement Fund, Municipal Employees' Retirement Fund and Teachers' Retirement Fund in the Connecticut Pooled Mortgage Investment Program. *Id.* The California Public Employee Retirement System and the California State Teachers Retirement system have participated in mortgage money loans to plan participants. *Id.* New York City Employees Retirement System and the Police Pension fund have financed urban housing rehabilitation. *Id.* The City of Hartford Municipal Employees Retirement Fund has participated in funding a community housing program. *Id.*

[94] *Id.* at 253-54. The Bricklayers and Masons Union and the Laborer's Union in Boston have used their pension plans to help fund housing projects. *Id.* Iron Workers Locals of New York City and the Amalgamated Bank of New York (owned by the Amalgamated Clothing and Textile Workers' Union) have developed a mortgage financing program based on various union pension fund assets. *Id.*

[95] MISSISSIPPI HOME CORPORATION, STATE OF MISSISSIPPI HOUSING PLAN 1991 Appendix A (1991).

[96] State law designates specific investments which are authorized for Public Employees' Retirement and Disability Benefits. MISS. CODE ANN. § 25-11-121 (Supp. 1991).

COMMUNITY REINVESTMENT ACT

In an effort to promote participation of the private sector in the provision of affordable housing, the Community Reinvestment Act (CRA) was passed in 1977.[97] This Act stated in part that "regulated financial institutions have [a] continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered."[98] With this pronouncement, Congress announced a policy that depository institutions enjoying the benefits of federal charters and federal deposit insurance owe a duty to consider the impact on its community when formulating its lending policies.[99] However, because of the vague language of the CRA and the lack of a prohibition or requirement of specific conduct, many criticize the act.[100]

The CRA is enforced through four federal regulatory agencies, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of the Controller of the Currency, and the Federal Home Loan Bank Board.[101] The process by which the CRA may be invoked against a financial institution is typically as follows. One of the four agencies above is required to conduct a regular review of the institution, generally every twelve to eighteen months. At this review, the agency gives it a CRA rating. Then, when the financial institution seeks approval from a federal agency for a merger, acquisition, or branch opening, that agency may review its CRA compliance record.[102] It is at this point that a community group can be effective in calling the examiner's attention to the CRA record and by filing a comment requesting a public hearing.[103] There are no strict guidelines or quotas mandating a particular result; but, often the financial institution will negotiate with the community group before it files a comment to save the lengthy delay that could otherwise result.[104]

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[97] 12 U.S.C. §§ 2901 *et seq.* (1988).

[98] 12 U.S.C. § 2901(a)(3) (1988).

[99] Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 Pac. L.J. 1071 (1987).

[100] *Id.* at 1085-86.

[101] 12 U.S.C. § 2902(1)(A)-(D) (1988).

[102] John W. Head, *Representation of Clients Under the Community Reinvestment Act*, 21 Clearinghouse Rev. 1004, 1005 (1988).

[103] *Id.*

Use of the CRA by housing advocates increased dramatically in the mid 1980's due to the passage of interstate banking laws and regional banking pacts.[105] One of the earliest uses came in Florida as a result of that state's passage of a regional banking law in 1984.[106] A group of legal services attorneys organized and took advantage of an opportunity to use the CRA in June of 1985 when C&S Bank of Atlanta, Georgia, announced plans to acquire Landmark Bank of Florida.[107] First, the group accumulated information and data which gave rise to serious questions as to Landmark Bank's compliance with the CRA.[108] Then, community-based organizations and groups, the NAACP and various legal services programs filed a comment and requested a public hearing.[109] After lengthy negotiations with the bank, it adopted a written agreement which has served as a model for subsequent agreements throughout the Southeast.[110] Within one year, similar agreements were obtained in Florida with several other banks, and legal services attorneys estimated that, as of the end of 1987, over $100 million had been invested in low- and moderate-income areas by banks signing lending agreements.[111]

Mississippi state banking laws changed in 1986, facilitating branching, mergers and acquisitions.[112] The CRA can be an effective tool for housing advocates in Mississippi, helping to obtain home mortgage loans for low- and moderate-income people. Carol Blackmon of the Jackson Community Reinvestment Coalition has worked extensively with the CRA in Mississippi.[113] Her organization, along with the Mississippi Legal Services Coalition is currently providing technical assistance to community groups around the state to educate them on applications of the CRA. Ms. Blackmon also reported several ways the CRA is being used in Mississippi. A CRA Coalition was formed in Jackson in 1988. In 1989, it challenged a pending application in which Deposit Guaranty sought to acquire Community National Bank of Shreveport. Although the challenge was a positive first step towards a CRA enforcement program, it was received by the Federal Reserve Board after the cutoff date; and the acquisition went through.[114]

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[104] *Id.*

[105] *Id.* at 1006. "[I]nterstate banking laws allow banks in one state to enter another state and acquire or merge with the in-state bank." *Id.* "Regional banking pacts are agreements between states in the same region to restrict the ability of lending institutions outside their region from coming in." *Id.* Mississippi has adopted legislation concerning both. *Id.* at 106 nn.14-15.

[106] *Id.* at 1007.

[107] Head, *supra* note 102, at 1007.

[108] *Id.*

[109] *Id.* at 1007-08.

[110] *Id.* at 1008.

[111] *Id.*

[112] Act of April 4, 1986, Ch. 469, 1986 Miss. Laws 622 (act to permit banks to establish branch banks on a statewide basis).

Another area of CRA activity is in promoting legislation. According to Ms. Blackmon, several bills with CRA language were introduced in 1991, but died in committee.[115] Bills have been introduced which advocat that banks publish their CRA rating, with this being a consideration of the State treasurer's office when choosing banks which will be depositories of state funds.[116]

Use of the Community Reinvestment Act is a valid tool for housing advocates. Even though no specifically defined results flow from a CRA violation, the threats of red tape and delays are often enough to insure that banks meet their CRA obligations and all facets of the community have access to bank loans.

CONCLUSION

Set out above are various housing programs and funding methods that could be employed in Mississippi to improve the state's housing stock. The challenge facing housing advocates is to transform the plans and models into a working housing program for the state. The state of Mississippi has a great need in the area of affordable housing, but it is taking initial steps toward attacking the problem. The Mississippi Home Corporation was set up through enabling legislation in 1988 and has been working toward housing solutions since that time. In addition, private nonprofit groups are making efforts to improve housing in patches across Mississippi. The state needs time, funding, organization and community support in order to achieve its housing goals.

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[113] Interview with Carol Blackmon, Jackson Community Reinvestment Coalition, in Jackson, Mississippi (Jan. 25, 1992).

[114] *Id.*

[115] Interview with Carol Blackmon, *supra* note 113.

[116] *Id.*

Stacey Earnest

BUILDING HOMES, BUILDING NEIGHBORHOODS
FAMILY SELECTION AND FAMILY NURTURE FOR LOW INCOME HOUSING IN TWO SOUTHERN COMMUNITIES

*Peter L. Beard and**
*Regina M. Hopkins***

I. INTRODUCTION

In the decades following World War II, the Federal and state governments spent hundreds of millions of dollars constructing low income housing units across the country.[1] These housing projects were designed to replace run down, turn of the century tenements with modern, more sanitary apartment buildings.[2] Over the years, however, the names of certain housing projects, such as the Cabrini-Green housing project in Chicago[3] and the Marcus Garvey Houses in the Brownsville section of Brooklyn,[4] have become synonymous with high crime rates and drugs. Too often, government housing projects have degenerated into some of the worst slum buildings in the United States.[5] As a result, government and private businesses have had to invest additional millions of dollars in rehabilitating and reconstructing housing projects within a comparatively short period of time following their initial construction.[6] For example, in 1987, 20 of the 30 original buildings comprising the Columbia Point housing project in Boston were razed within 35 years of their construction.[7] The buildings were demolished in order to make way for a new, mixed income housing project which was being built at the site. The remaining 10 buildings were completely gutted and renovated. At the time of the demolition, conditions had become so bad at the project that only 350 of the original 1,500 apartments were occupied.[8] The new project, called Harbor Point, provides for only 400 units of low income housing.[9]

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[1] Camilo Jose Vergara, *Hell in a Very Tall Place*, 264 ATL. 72, 76 (Sept. 1989).

[2] *Id.*

[3] Eileen Kerdoja, *Non-Tenant Byrne and Cabrini-Green*, NEWSWEEK, October 19, 1981, at 20.

[4] Vergara, *supra* note 1, at 75.

[5] MICHAEL HARRINGTON, THE OTHER AMERICA 148 (1981).

Clearly, the deterioration and destruction of so much new housing stock within a few decades of being built represents one of the most costly failures in government efforts to combat poverty housing. What has emerged from this failure has been the realization that, in the past, low income housing programs have devoted too much of their resources on the construction of large apartment buildings and too little on helping the families overcome some of the underlying causes of their poverty.[10] The programs were designed merely to provide shelter without any thought to the other elements which make a shelter a family's home.

Families in poverty often need as much emotional and spiritual support as material assistance. Generally, poverty-stricken people have low self-esteem and often have no sense of belonging. Depression, feelings of futility, and a lack of trust in others are common by-products of being poor, therefore people below the poverty level often see themselves as outcasts and rejects.[11] Moreover, they do not see any reward for good work. In fact, many government programs provide major disincentives to advancement.[12]

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[6] Michael Kimmelman, *Out of a Failed Project Comes a Design for Living*, New York Times, Sept. 13, 1987, § 2, at 48, col 1.

[7] *Id.*

[8] *Id.*

[9] The Columbia Point housing project also highlights another critical housing development over the past few decades, namely the loss of large numbers of low income housing units during that period. These losses have occurred for two reasons: (1) the deterioration of units due to poor maintenance and repairs and (2) the loss of units through condominium and cooperative apartment conversions as a result of the gentrification of neighborhoods. From 1974 to 1989 over 2.5 million low cost housing units were removed from the market. JT. CTR. FOR HOUSING STUDIES OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 17 (1991).

[10] Celia W. Dugger, *Here Poorest Are Resented by Poor*, N.Y. Times, Nov. 6, 1991, at B-1.

A government bureaucracy which rigidly enforces government regulations, even when the regulations lead to absurd results reinforces this situation. For example, during much of the 1980s New York City was paying $2,000 per family per month to house homeless families in so-called welfare hotels. These welfare hotels have been described as squalid, drug infested buildings in which whole families are crammed into a single room, with no kitchen facilities.[13] The reason the City did this was because it was dependent on Federal housing funds to pay most of the cost of housing the families and Federal regulations prohibited using emergency housing funds for providing permanent housing, such as apartments, for the homeless.[14] In contrast, welfare hotels were considered temporary housing, and thus eligible for Federal funds, even if the family lived in the hotel for years. The Federal government continued this policy for most of the decade, even though placing families in decent, renovated apartments would have cost a fraction of what was being spent each year to house the families in the welfare hotels.[15]

When faced with this bureaucratic obstacle course, the poor often stop trying to change their situation because too often they have had their hopes raised, only to be repeatedly disappointed.[16] This prevailing sense of apathy makes it difficult for the poor to band together in self-help or community organizations,[17] particularly when few government programs encourage this type of activity.[18] However, it is only when families recognize they have some control over their own lives; and are not at the mercy of an uncaring and unresponsive system, that they will be able to overcome their feelings of futility and despair. Thus, self-help activities are a major element to the success of a housing program because they give the families that sense of control over their lives and their environment.

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[11] HARRINGTON, *supra* note 5, at 138.

[12] Mary Joe Banes & David T. Ellwood, *Is American Business Working for the Poor*, 69 HARV. BUS. REV. 58, 60 (1991). This can be illustrated by the following example. A family on public assistance qualifies for Medicaid benefits. A family with one person working full time at a minimum wage job and another working part time at a minimum wage job, while still well below the poverty level, will no longer qualify for Medicaid benefits. When, as is typically the case, a minimum wage job does not provide medical insurance, a family with two workers can face a greater economic risk from illness than a family on public assistance. *Id.*

[13] Lydia Chavez, *New Families are Barred From Hotel*, N.Y. Times, Jan. 14, 1988, at B-1, col. 2.

[14] JONATHAN KOZOL, RACHEL AND HER CHILDREN 202 (1988).

[15] *Id.* at 41.

[16] *E.g.*, *id.* at 42-44. "[Annie Harrington is] given $13 every two weeks to pay for travel costs of hunting for apartments; but her rental limit is $270 and she understands,

The first step in the process of empowering the families is a well developed process for selecting families to participate in the affordable housing program. The family selection process should focus not on the physical structure, but on the intangible elements that make a shelter a home. The agency administering the program must further enhance the process by implementing

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after four years of searching, that she'll never find a home until the limit is increased. 'Places I see, they want $350, $400, $500. Out in Jamaica [Queens, New York] recently, I met an older lady. She had seen me crying, so she asked me: "What's the matter?" I explained to her how long I had been looking for a home. She said: "Well, I own a couple of apartments." The rental was $365. She said that she would skip the extra month and the deposit. I had told her what my husband does, my children. I had Doby with me. I believe she took a liking to me. So I was excited. Happy! And she handed me the lease and proof of ownership and told me I should take them to my [social] worker, and she gave me her phone number. A nice lady. And you see — you do forget what is your *situation*. You forget that you are poor. It's like a dream: This lady likes me and we're going to have a home! My worker denied me for $365. I was denied. $365. My social worker is a nice man but he said: "I have to tell you, Mrs. Harrington. Your limit is $270." Then I thought of this: The difference is only $95. I'll make it up out of my food allowance. We can lighten up on certain things. Not for the children, but ourselves. We'll eat less food at first. Then I can get a job. He'll finish his computer course. The house had a backyard. . . They told me no. I was denied."

"Do you know that they are paying $1,900 every month for me to stay here [at the Martinique Welfare Hotel]? Sixty-three dollars every night. So for two nights you'd have $95 right there. I told my social worker that. I said it don't make sense and he agreed with me but he is not the one that made the rules; and he was right. . ."

"Four years ago I used to be the happiest girl you'd ever see. You'd see me smiling. I'm not happy anymore. Four years of my life went down the drain. Four years are gone. I lost it. (Cries.) Things inside me, not things that you could see. *Inside* things, I lost it. I don't have it in my inside anymore." *Id.* at 42-44

[17] HARRINGTON, *supra* note 5, at 138. *See also*, Bill Tierque, *When Tenants Take Charge*, NEWSWEEK, Nov. 27, 1989, at 44.

[18] For example, until 1987, low income tenants were not permitted to purchase apartments in Federally financed public housing projects. Jerome Cramer, *Turning Public Housing Over to Resident Owners*, TIME, Dec. 12, 1988, at 15.

a "nurture program" designed to teach the families basic living skills. Only with such programs in place will the families be able to combat their feelings of powerlessness and despair and to view their house as a home.

This article will examine the importance of designing an appropriate process for selecting families prior to building affordable housing units and the need to work with families, as part of the nurture process, after the families have been selected and the houses have been built. Two case studies will be examined involving Habitat for Humanity programs in two southern communities: the Liberty City section of Miami, Florida, and Coahoma, Mississippi, located in the Mississippi Delta. These cases provide an opportunity to examine some of the techniques used in those communities to help the families adjust to their new homes, and how the new homes can be used as a tool to enable and empower the families to have more self-confidence and control over their lives.

II. THE HABITAT FOR HUMANITY PROGRAM

Habitat for Humanity is an ecumenical Christian housing ministry which was founded by Millard and Linda Fuller in 1976.[19] It currently operates in over 600 locations in 49 states and the District of Columbia, and in over thirty countries around the world. Under the Habitat for Humanity program, simple decent homes are sold to low income families at no profit, using no-interest mortgages. In the United States and Canada, the program in each community is run by a local corporation which is affiliated with Habitat for Humanity International and which is governed by its own Board of Directors. Each affiliate is responsible for raising funds and materials locally; selecting the families in the area who will receive a Habitat house; supervising the construction of Habitat houses; and helping the families complete the family nurture program. The majority of Habitat for Humanity affiliates are staffed and supported entirely by volunteers, who perform the work in their spare time. Some affiliates may have the help of one or two paid employees whose job is to coordinate the activities of the affiliate. The local affiliate is subject to the general review of Habitat for Humanity International and must follow certain principles of the Habitat for Humanity program, such as selling houses at no-profit, and not charging interest on mortgages.

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[19] MILLARD FULLER & DIANE SCOTT, LOVE IN THE MORTAR JOINTS 82 (1980).

Habitat for Humanity does not simply give homes to Habitat families because it has learned that selling the home to the family does more to preserve the family's dignity and to raise their self-esteem. In addition, the families understand that house payments are used to help finance the construction of additional homes, thereby allowing the families to participate in spreading the benefits of the Habitat for Humanity program. This is different from most Federal low income housing programs which provide either subsidies for the construction of rental units[20] or subsidize the rent paid by low income families for existing housing.[21]

In order to minimize the cost to the family and to provide the greatest number of homes, Habitat houses are built with simple designs.[22] In the United States, a three bedroom Habitat house will typically be around 1,000 square feet, with a single bathroom and no garage. Habitat for Humanity also encourages house designs which allow some degree of accessibility for the disabled. The average cost of a Habitat house is approximately $32,000 and with a twenty year, no interest mortgage, house payments are $150 per month, plus taxes and insurance. To the greatest extent possible, Habitat homes are constructed with volunteer labor and the family's sweat equity, which lowers the cost of the house further. Habitat selects families for homes without regard to race, creed, color, sex, national origin, or disability.

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[20] *See, e.g.*, I.R.C. § 42 (1991) (discussing low income housing credit).

[21] *See, e.g.*, 42 U.S.C. § 1437(f) (1978) (discussing Section 8 housing program which provides rent subsidies for low income families).

[22] When financial resources do not meet the need for housing, those scarce resources should be used in the most efficient manner possible. Many programs tend to overbuild housing units and, as a result, do not receive the maximum benefit from scarce donor and governmental funds.

III. The Family Selection Process

A. Family Selection — In General

In the past, public agencies have paid little attention to the process by which families have been selected to participate in affordable housing programs. In many housing programs, the only criteria used in family selection have been based on financial need.[23] Families with incomes below a certain level were eligible for low income housing; families with incomes above such level were not. At no time during the process would the agency determine what problems were within the family; if the family would be able to cope with living in the new housing; how the family would interact with other families in the area; and the nature of the family's background.[24] As a result, the families often found the adjustment to the new community difficult and brought to the new neighborhood the same problems with which they had been struggling in the past.[25]

Therefore, it is important that the agency developing an effective affordable housing program pay special attention to the design of its family selection procedure. If well drawn, the family selection procedure can be an important first step in helping the families overcome their feelings of helplessness and despair. The simple fact that they are chosen to receive a new home will demonstrate to the family that good things can happen in their lives. In addition, if the family is required to take specific steps and meet certain requirements before being chosen to receive a new home, the family realizes that positive action on their part will be rewarded. Finally, as the family sees themselves and other families receiving new homes, they learn to trust others.

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[23] *See, e.g.*, Dagger, *supra* note 10, at B-1.

[24] *Id.* For example, during the past few years New York City has been relocating many families previously housed in welfare hotels. These families have been moved into apartments in some of the City's poorer neighborhoods. The families have often met with resentment from longtime residents of the neighborhoods because the newer families have received newly renovated apartments, while poor families already residing in the neighborhood have not. In addition, the relocated families have continued to suffer from many problems, such as drug abuse, which they had prior to being relocated. In turn, the longtime residents have viewed them as damaging the quality of life in the neighborhood. Moreover, the City has provided no support services for the relocated families, and the families have had no relatives and friends in the neighborhood to offer such support. The families, therefore, have not always adjusted well to their new surroundings. *Id.*

[25] *Id.*

In order to accomplish these goals, a family selection process should require initiative on the part of the family and should reward them for taking positive action. The family should not just be given a house, they should have to apply for and earn it. Also, the agency building or providing the housing must be careful not to promise too much at the time the family is chosen. If the family is promised a three bedroom house within a year, the agency must be able to honor that commitment. Otherwise, the family will lose faith in the program, reinforcing the lack of trust the family has for others. Also, the selection process should lay the ground work for the family nurture work which follows. The family's obligations should not end once they are selected for a new home. For example, the family could be required to attend workshops or community meetings or to actually work on the construction of their new home. This teaches the family that they must continue to meet their obligations in order to receive a benefit. Finally, the family should be given at least some control over the design and construction of their home. That way, the family feels that the house is really theirs and that they are in control of their environment.[26]

B. Family Selection Under the Habitat for Humanity Program

1. In General

Each Habitat affiliate should have a family selection committee which selects the families eligible to receive a Habitat home built by the family and the affiliate. The committee is usually composed of members of the local board, but may also include Habitat homeowners or other people with ties to the

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[26] While this article assumes that the housing is new construction, the same or similar concepts can be applied to rehabilitation of pre-existing housing. For example, a family could be given the opportunity to select the colors and actually paint their new apartment. Also, the family could perform minor repairs (e.g., plumbing, spackling, etc.) necessary to make a rental unit habitable. The family's work could also extend to the common area like maintenance of the hallways or the construction of a playground.

"community of need."[27] Among the responsibilities of the family selection committee, the committee must determine the criteria pursuant to which the families will be selected. These criteria will vary from affiliate to affiliate, and will be based on local community standards. For example, in certain locations where public housing is safe and decent, the family selection committee may give a lower priority to families in public housing than in other locations where public housing is dangerous or dilapidated. In general, however, the criteria focus on three main areas:

a. The family's actual housing need based on the suitability of their current shelter;

b. The family's income and ability to pay for a Habitat house;[28] and,

c. The family's willingness to participate as a partner with Habitat in the building of their house and the houses of others.[29]

In general, the need for housing is assessed in accordance with the following standards:

(i) A family will be considered for a Habitat house only if their present housing is not adequate and adequate housing cannot be acquired through current conventional means. Lack of adequate housing may include problems with the present structure, the electrical, gas, water, heating, or sewer service systems, bathrooms, the kitchen, the family's safety, or the failure to meet city or county property maintenance standards. The number of persons and the ages and sex of household members will also be taken into consideration as a test for adequacy (i.e., a family with a boy, aged 11, and a girl, aged 9, living in a two bedroom house may need a house with an additional bedroom); and,

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[27] Habitat for Humanity refers to the "community of need" as that part of the community which does not have access to adequate housing or other basic human needs.

[28] As previously mentioned, Habitat homes are sold to families and are not given to them. As a result, a family must have some source of income to participate in the Habitat for Humanity program. This is obviously a problem for homeless families with no regular source of income who may not have the means which will allow them to make house payments. Moreover, most local Habitat affiliates cannot provide the intense social services which homeless families may require. To help solve this problem, Habitat for Humanity has established a program to deal with the special needs of homeless families, known as the Habitat for Homeless Humanity program. Under this program local Habitat affiliates work in partnership with other organizations which provide assistance to the homeless. Habitat affiliates have built shelters and transitional houses for these organizations, and the partner organizations have provided the counseling and other assistance which such families need. Sometimes, when the family's situation has stabilized, the family has "graduated" to a Habitat home.

[29] HABITAT FOR HUMANITY INTERNATIONAL, HOW TO START A HABITAT AFFILIATE 85 (John R. Alexander ed., 2d. ed. 1990).

(ii) The percentage of the monthly income which the family currently spends on housing will also be considered to determine need.[30]

A member of the family selection committee usually visits each applicant family where they are currently living. This helps the committee assess the family's housing needs and also allows the family and the committee member to become acquainted with each other in a setting which is more informal than an office visit would allow. This meeting is designed to establish a relationship between the family and the Habitat affiliate. It is this relationship which forms the basis for the family nurture program to follow.

In order to show an ability to pay, the family must demonstrate that they have the means to make the monthly mortgage payments, including monthly payments for taxes and insurance. The monthly payments cannot jeopardize the family's ability to meet all other financial obligations and living expenses. Generally, this will mean that a family must have a monthly income equal to at least four times the anticipated monthly mortgage payments. Habitat for Humanity imposes this requirement because, if the family cannot afford the costs of home ownership, the house will become a financial burden to the family and will draw resources from other needed areas, such as health care, food, and clothing. Alternatively, in order to cut costs, the family will not perform needed maintenance on the house, and the new house will soon fall into disrepair. As a result, the family will not receive any benefit from participating in the Habitat for Humanity program, further reinforcing their feelings of despair and their sense of futility.

In order to show a willingness to participate as partners with Habitat for Humanity, the family must demonstrate a commitment to contributing a minimum number of hours of sweat equity by working on the construction of Habitat homes for themselves and other families. This commitment fosters trust, cooperative effort, and a sense of accomplishment, but, in order to be effective, the sweat equity requirement must be fair and enforced. While the actual requirements will vary from affiliate to affiliate, typically, a family must complete between 300 and 500 hours of sweat equity. If a homeowner cannot perform the sweat equity because of age or physical impairment, the work may be performed by a family member or friend. Usually the homeowner family should work at least 50% of their hours on building other Habitat homes and the remainder of their hours on building their own home.

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[30] *Id.*

Sweat equity serves several functions which all help to break the psychology of poverty. First, it helps preserve the family's dignity because the house is not just a handout - the family has worked for it and has been rewarded for their efforts. Second, because the family helps to construct their home with other volunteers, construction costs are reduced and the house is less expensive to buy. Third, by working on the homes of other Habitat families, each homeowner becomes part of a larger community, and the families learn that by working together they have a better chance of solving their problems together. Finally, by working on the house the family learns basic construction skills which will help the family to maintain the house in the future.[31]

In addition to performing the sweat equity, the family must demonstrate a willingness to maintain and repair the home from the time of occupancy; to participate in workshops on such subjects as home maintenance and repair, budgeting, and legal issues involving home ownership; and, to save towards the down payment on the house. Once the family completes a minimum number of sweat equity hours and satisfies the other requirements, construction can begin on the family's house. The family moves in once the house is completed.

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[31] Sweat equity not only serves families in need, but it also ministers to more affluent Habitat for Humanity volunteers. Habitat families and volunteers work together at the building site. Therefore, sweat equity allows the community to come together to build the home with the family. For those volunteers, the poor are no longer a nameless, faceless mass of people, but real families that they know and with whom they have worked. Because of this recognition, the volunteers should be more compassionate towards and willing to help others.

If at any time the family fails to continue performing their sweat equity; fails to attend the required workshops; or does not save for their down payment, they can be dropped from the Habitat for Humanity program. Before doing so, however, the family selection committee should work with the family to determine if there is a reason why the family is not satisfying the requirements. For example, it may be determined that an illness in the family or a lack of child care or transportation to the job site has led to the problem. In such case, the committee should attempt to work with the family to help them meet the Habitat requirements. At the same time, the family selection committee must recognize that not every family is ready to meet the requirements of owning a Habitat home, and it would be unfair to the other families not to enforce the sweat equity and other selection criteria.

It is Habitat for Humanity's general selection criteria which provide a foundation upon which a family can build a house and a home. The selection of the families which are willing to accept the challenges and the resulting successes is a major step toward overcoming the psychology of poverty. Two Habitat for Humanity affiliates who are currently working with the general family selection criteria are Habitat for Humanity of Coahoma, Mississippi (Coahoma HFH), and Habitat for Humanity of Greater Miami (Miami HFH). Each of these affiliates is trying to devise family selection criteria which are responsive to the needs of the families in their area, but at the same time follows the general principles of the Habitat for Humanity program.

2. Coahoma, Mississippi

Coahoma, Mississippi, is a town of around 350 residents located in the Mississippi Delta, about one hour's drive from Memphis, Tennessee.[32] In many ways, Coahoma is an example of some of the worst rural poverty found anywhere in the United

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[32] *Coahoma Habitat, Coahoma, Mississippi,* MORTARBOARD 5 (Sept. 1990).

States. In this town, the average family income is around $4,100 per year.[33] Eighty-five percent of the town's housing is deemed substandard because it lacks indoor plumbing or insulation.[34] Coahoma did not even possess a sewer system until 1989, and the town has only one paved road.[35]

Coahoma HFH was founded in 1985. Because of the extreme poverty in the area, work by the affiliate has been slow, hampered by the small amount of money which can be raised locally. In order to assist it in its work, however, Coahoma HFH has received funding from such outside agencies as World Vision and the National Fellowship of Baptist Men. In addition, Coahoma HFH has attracted work camps from all over the United States which bring additional resources to enhance those available locally. For the past two years, Coahoma has been one of the sites of Habitat for Humanity's Collegiate Challenge, a program under which college students from across the country spend their Spring breaks working at Habitat for Humanity affiliates in the United States. During this two year period, college students have raised almost $120,000 for this project and built twelve houses in Coahoma.

Coahoma HFH generally follows the family selection criteria outlined above, with a few modifications. As is the case with other affiliates, a prospective Habitat family must demonstrate the need for a new house. However, because of the enormity of the need for housing in Coahoma, the family selection committee has put less emphasis on selecting families in need and more on prioritizing the relative needs of families. Therefore, Coahoma HFH's family selection committee has given priority to large families with young children, senior citizens, and persons with disabilities. In particular, the committee has targeted families with small children. The committee hopes to reach the children while they are still young and are able to receive the maximum psychological and physical benefits from a new Habitat house.

The family must also demonstrate an ability to pay for the house. Because of the low cost of land and labor, a Habitat house in Coahoma costs between $9,000 and $10,000. In order to show ability to repay a house loan, the family must have a monthly cash income of $300 per month. Because of the high unemployment rate, families are not required to have a family member who is employed. Coahoma HFH, therefore, will take into account all sources of family income, including governmental assistance.

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[33] Beth Kampmeier, *A New Home*, 105 WOOSTER 30, 30 (Fall 1990).

[34] MORTARBOARD, *supra* note 32, at 5.

[35] Kampmeier, *supra* note 33, at 30.

To demonstrate their commitment to the Habitat for Humanity program, most Habitat families in Coahoma must perform 500 hours of sweat equity. However, many Habitat families in Coahoma are headed by single mothers. If the mother is working, it is often difficult for her to hold down a job, to care for her family and to perform 500 hours of sweat equity within a reasonable period of time. In such cases, the sweat equity may be reduced to as low 200 hours. However, the family must pay for not working the additional sweat equity hours at a rate equal to $1 per hour.

In addition to the sweat equity requirements, the family must demonstrate an understanding of the requirements of home ownership and a willingness to accept the financial responsibility involved in owning a home. These include budgeting the family income, maintaining the property, and making house payments on time.

Coahoma HFH's goal is to eliminate poverty housing from the town by 1996. At the end of 1991, 24 Habitat homes had been built, providing decent housing for approximately 120 of the town's 350 residents. In turn, through their house payments and sweat equity, these residents continue to contribute to the construction of additional Habitat houses in Coahoma, Mississippi.

3. Liberty City

The City of Miami, Florida contrasts starkly with Coahoma, Mississippi. Miami is an ethnically diverse city with a population of 373,940 people,[36] which includes large groups of Cubans,

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[36] U.S. DEPT. OF COMMERCE-BUREAU OF THE CENSUS, SOUTH - 1986 POPULATION AND

Haitians, other Latin Americans, African Americans, and Whites of European descent. Miami is also the seat for Dade County, which, in addition to Miami, includes 26 other communities and has a total population of 1,769,500 people.[37] Dade County covers an area of 1,960 square miles.[38] Miami HFH serves all of Miami and the surrounding areas of Dade County.

In devising a family selection process, Miami HFH confronted several issues. First, Dade County's size and the number of diverse communities made it very difficult to appoint a single family selection committee. Few, if any, members would be familiar with all of the neighborhoods in which Miami HFH would be building. However, if each community were represented on the committee, the size of the committee would be unwieldy. Moreover, since the family selection committee visits every prospective Habitat family in their home, the physical size of Dade County would make the work of a single committee very difficult.

Miami HFH, therefore, maintains a family selection committee which has five "at-large" members from the greater Miami area. In addition, there are three subcommittees of the family selection committee, each representing a different community in which Miami HFH is currently building houses. These communities are South Miami, Homestead, and Liberty City. Each subcommittee has between three and five "at-large" members from the family selection committee and an equal number of representatives from the community in which the building is taking place. These representatives may otherwise have no connection with Habitat for Humanity. The "at-large" members are included on each subcommittee in order to ensure consistency and uniformity among the family selection subcommittees and to ensure that each subcommittee has members who understand the Habitat for Humanity program. The community representatives are included because they are familiar with the community from which the prospective homeowners come, and they can bring an outsider's perspective to Miami HFH and its family se-

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1985 Per Capita Income Estimates for Counties and Incorporated Places 24 (1988).

[37] *Id.*

[38] Cambridge World Gazetter 207 (D. Munro ed. 1988).

lection process. The Liberty City subcommittee has five at-large members and five community members. The five community members include a local pastor, a local teacher, and a member of the board of directors of the local community action group.

Each subcommittee reviews applications from its community and evaluates each in accordance with the family selection criteria. Families who qualify for conventional financing or who live in adequate shelter are not eligible for a Habitat house. Miami HFH uses the same family selection criteria used by other affiliates, with a few exceptions. For example, in order to show ability to pay, at least one member of the family must be employed. In addition, because of the high cost of living in Miami, a family of four should have an income level of at least $12,100 (with an additional income of $2,040 for each additional family member).[39] This is to ensure that the family is not burdened by the costs of home ownership. Families with incomes below this level may be better served by some other housing program.

Miami HFH requires each family to perform 400 hours of sweat equity, of which at least 250 hours must be performed by a person who will be residing in the home. This requirement may be waived in the case of a homeowner's disability. Sweat equity helps to ensure that the prospective homeowner has an understanding of how the house is built and how it can be repaired.

In addition to the above criteria, the family selection committee takes into account such factors as family stability, the presence of minor children in the family, and the family's honesty. In situations where other selection factors are similar, preference is given to people living in the community where the Habitat houses are being built. This prevents longtime residents of the neighborhood from resenting the Habitat families because they are outsiders. Community preference also eases the adjustment process for the family, since they are already familiar with the neighborhood.

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[39] Banes & Ellwood, *supra* note 12, at 60. The $12,100 amount is below the Federal poverty level for a family of four, which, in 1989 was just under $13,000, and, which in 1992 is projected to be approximately $14,000. *Id.*

These criteria were most recently used as part of the 1991 Jimmy Carter Work Project which was hosted by Miami HFH. Each year, former President and Mrs. Jimmy Carter devote one week to building houses with Habitat for Humanity projects in the United States. In the past, Jimmy Carter Work Projects have been hosted by such affiliates as Tijuana/San Diego Habitat for Humanity, Habitat for Humanity of Charlotte, North Carolina, Atlanta Habitat for Humanity, and Habitat for Humanity on the Lower East Side, in New York City. As part of a work project, volunteers from around the United States join President and Mrs. Carter in building a number of houses in a one week period.

In June 1991, the Jimmy Carter Work Project built 14 houses in the Liberty City section of Miami. The families were selected by the Liberty City family selection subcommittee from applicant families already living in the neighborhood. The selected families completed at least 50 to 100 hours of sweat equity prior to the start of the work project and also completed an additional 50 to 75 hours during the project week. The project site also included an additional piece of land on which a house could not be built. Therefore, in order to integrate the project into the neighborhood and to give the community a sense of partnership with the Jimmy Carter Work Project, Miami HFH surveyed the families in the community and determined that one of their most pressing needs was adequate child care. Consequently, Miami HFH entered into an agreement with the local YMCA whereby a child care center was constructed on the site as part of the Jimmy Carter Work Project. After the center is completed, the local YMCA will operate it.

Miami HFH has started to build a community in Liberty City with this project. By the end of 1992, Miami HFH expects to have completed 20 houses in Liberty City and an additional 15 houses in the Greater Miami area. Obviously, these homes will not have the dramatic impact on the community that a similar number of houses would have in Coahoma, Mississippi. However, the work of Miami HFH has done much to break the psychology of poverty in the families participating in the Habitat for Humanity program and their example may have a ripple effect which spreads to other families in Liberty City and to other Miami neighborhoods.

4. Summary

Coahoma HFH and Miami HFH have each implemented a family selection procedure which is intended to help families solve their own housing problems. The reliance on sweat equity and educational workshops help raise the family's sense of self-esteem and rewards them for their efforts. Moreover, the family selection committee holds the family accountable by ensuring that the sweat equity and workshop requirements are met. However, the family's work does not end once they move into the house. The family selection process is just the first part of a family nurture program which begins before the family is selected to receive a house and ends long after the family receives its new home.

IV. THE FAMILY NURTURE PROCESS

A. *Family Nurture — In General*

There is a tendency to think that if a family is living in a shack all they need is a decent house and their problems will be solved. However, such an attitude ignores the reasons why the family was living in substandard housing in the first place. At its best, an affordable housing program not only provides the family with decent shelter, but also helps them build self-esteem and a sense that they are in control of their own lives. By teaching them basic problem-solving skills, the affordable housing program helps the family develop the confidence necessary to overcome other problems which they may face in their lives. In a sense, the house is just a tool by which the family is taught problem-solving skills. However, if such problem-solving training is not made a part of the affordable housing program, the family is at risk that, within a short period of time, they will be suffering from the same problems as they had before they received their new home.[40] Therefore, an affordable housing program should develop a family nurture curriculum which is designed to assist the family in developing these problem-solving skills.

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[40] *See, e.g.*, Dugger, *supra* note 10, at B-1. The City of New York has found that homeless families who are moved out of shelters into permanent apartments in poor neighborhoods often succumb to the problems which are prevalent in their new commu-

In addition to helping the families combat their feelings of low self-esteem and despair, the affordable housing program must also deal with the fact that the housing which the family receives under the program creates a new set of challenges which the family must face. For example, if the family moves to a different neighborhood, they may find it difficult adjusting to their new environment and may not have an easy time coping with the problems they encounter there.[41] In the case of a housing program which provides for the purchase of a home by a family which has never owned a house, nor had close family members who owned their own home, the family may not have a clear understanding of what home ownership requires. They made need someone to assist them in learning what those new responsibilities include.

The family nurture program, therefore, must help the family recognize and cope with these problems. In addition, it should build on the foundation laid by the family selection program when it chose the families. After going through the family selection process, the family should have an increased sense of self-worth and feel that they have more control over their lives instead of being completely dependent on the actions or inactions of others. The family nurture program should enhance these positive feelings, but at the same time should recognize that these feelings are very fragile. Giving the family other avenues for success is one way the nurture program can solidify the family's feelings of self-confidence and empowerment. Finally, to the extent that the family does not meet its responsibilities, the program must equitably enforce the principal elements of the program.

B. *Family Education*

A family nurture program should teach skills which will en-

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nities. The shelters are isolated communities, where the families keep to themselves. However, once out in the communities, the families are exposed to drugs, prostitution, and other crimes and may fall victims to such conditions. *Id.*

[41] HARRINGTON, *supra* note 5, at 138.

sure that the family is not burdened or overwhelmed by the housing program itself. Otherwise, the program may compound, rather than combat, the family's feelings of inadequacy. This can be done by (1) selecting only those families who have a reasonable expectation of successfully completing the program; and, (2) tailoring the program to meet the needs of individual families, as Coahoma HFH did when it modified its sweat equity requirements to meet the needs of single mothers. The program should also provide information for the family, either through workshops, written materials, or one-on-one assistance. Such programs answer the family's questions about the program itself and also helps them learn basic problem-solving skills. Sweat equity is another method of teaching the family because the family learns through experience. Finally, the nurture program should facilitate the family's efforts to apply those skills to other problems by helping them form tenant or homeowner organizations, which will allow all the families in the program to work together to solve other problems.

Often families need help in acquiring basic skills in areas such as home maintenance and repair, budgeting and legal rights and responsibilities. For example, if a family has always rented their home, they have never been responsible for home maintenance or repair. To the extent that such maintenance and repair has been done, it has been the landlord's responsibility. Consequently, if the family purchases a home as part of an affordable housing program, the family must learn about home maintenance and repair, and the skills necessary to carry out those tasks.

In addition, the family often needs to learn how to budget their income to meet the financial responsibilities of their new home. This includes learning how to save money for predictable upkeep and repairs, making insurance payments, saving for quarterly or annual property tax payments, and keeping house payments current. A budgeting program should assist the family in planning and managing their indebtedness. For example, there is a temptation to buy new furniture to put into the new home. If the family buys the new furniture, they may become saddled with too much debt and be unable to make their payments on the house and the furniture at the same time. Alternatively, the family may not budget and save the extra money necessary to pay a plumber or an electrician if there is a problem with the home. Helping the family learn proper budgeting techniques is an important aspect of the family nurture program.

Most low income families also do not have a clear understanding of the legal responsibilities of owning or renting a home and may not have access to legal counsel. This is compounded by the fact that they may be functionally illiterate or do not have good English language skills. In such cases, they need someone to explain what a lease or a deed and mortgage are and what their legal rights are under such documents. In addition, the family may not understand the potential liability they face, not only for their house payments, but also if someone were injured on their property. Therefore, the family needs to know the purpose for homeowners insurance and the need to maintain liability and fire insurance on the property.

If the affordable housing program employs sweat equity as part of its family nurture program, then the skills learned by the homeowner families on the job site can be used to reinforce the lessons homeowner families learned as part of the informational workshops. Moreover, the family nurture program can coordinate its activities with other educational programs serving the community, such as adult literacy programs, in order that the homeowners can fully benefit from the learning opportunities provided by the affordable housing program. The important point for the affordable housing program to remember is that, unless the program is designed, in part, to teach basic skills to the families, the families will not be able to transfer the lessons learned through the program to other areas. In each case, the educational program should assist the families in overcoming the many elements which cause poverty.

C. Payment Program

An important part of any affordable housing program is holding the family accountable for their financial and other commitments. Without such accountability, the family may fall back into a traditional role of passivity and dependence. Therefore, as part of the family nurture process, an affordable housing program should establish procedures for dealing with delinquent house payments.

Often families in need do not have a history of making regular payments for housing. In addition, because low income families do not have much in savings and other benefits, such as health insurance,[42] they can quickly fall behind in their housing payments when an unexpected emergency occurs, such as the loss of a job or an unexpected illness.[43] The family nurture program must deal humanely, but realistically with such problems. The program must strike a delicate and often difficult balance between giving the family enough time to work out their problems and ensuring that the family keeps their commitments. This is an often difficult but necessary requirement. Otherwise the housing program falls back into the predictable role of doing things for the family and not allowing the family do things for themselves. The family must feel that they can solve their problems on their own, and if the family does not accept this responsibility, the problems will not be solved. The nurture program must be firm in this area. If a family is unwilling to accept their responsibilities, the housing program may have to remove the family from the program. In the event a family leaves the program, the program has an important responsibility to the family of assisting them in locating and securing adequate housing. If the program returns a family to a shack, the program has only fostered and perpetuated the elements of poverty.

D. Homeowner or Tenants Associations

Perhaps the most important aspect in developing a successful family nurture program is the formation of an active tenants' group or homeowners' association. A successful group not only can help to solve the families' housing problems, but, as the families learn to act together and draw on each member's strengths, the group can also serve as the vehicle by which the families can solve their other problems as well. In addition, the group allows the families to feel in control of their lives because they are no longer helpless and alone. Thus, the group becomes the key element to empowering the low income families participating in the affordable housing program.[44]

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[42] Banes and Ellwood, *supra* note 12, at 60.

[43] KOZOL, *supra* note 14, at 4.

Because of the importance of the tenant or homeowner organization, other aspects of the family selection and family nurture program should be oriented to establishing and strengthening the family group. It is important that the affordable housing program overcome the lack of trust the families may place in others. This may be difficult to do, since the poor are often victimized by others. However, the affordable housing program can build mutual trust in many ways. For example, the Peoples' Self-Help Housing Corporation of San Louis Obispo, California divides the families into teams of ten families each which work together to help construct each other's homes.[45] By working together the ten families develop a close relationship with each other and learn mutual self help and trust.[46] Some Habitat for Humanity projects reinforce the team concept by providing that none of the families can move into their new home until all of the homes are finished.

When the families band together, not only can they draw on their collective skills, but they have a much greater chance of having government agencies and private interests respond to their concerns. For example, the City of Boston had for all intents and purposes, written off the Columbia Point housing project by the late 1970s.[47] So little was being done to maintain the buildings, much less improve them, that in 1980 the project was placed under Federal receivership by the United States District Court.[48] In order to deal with this situation, the 350 families remaining at the project formed a tenants' association. In 1981, they reached an agreement with the City which provided that any new development on the site would contain at least 400 units of low income housing. In 1983, the tenants' group and the court appointed project director selected a private developer, which took over management of the project in 1984.[49] The group negotiated with the developer until they found a mutually agreeable design for the new development at the site. Also, in order to protect the families, the tenants' association negotiated for and received sole authority to evict low income families from the project while the construction was taking place.[50] The tenants' association stayed with the process during many long, frustrating years. However, their efforts finally bore fruit when work on the new project began in 1987.

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[44] Cramer, *supra* note 18, at 18. One of the most celebrated examples of the positive effects of a tenant organization is found at the Kenilworth-Parkside housing project in Washington, D.C. In 1982, the tenants bought the project from the District for $1. Since that time, the families have dramatically upgraded the physical condition of the project by requiring each family to take care of the maintenance for their apartment. To ensure that this will be done, a member of each family is required to take a six week training course covering such topics as budgeting, sanitation, and home maintenance and repairs. The tenants' group has also founded a day care center, barber and beauty shop, moving company, and construction management company which together employ 100 tenants of the project. *Id.*

[45] PEOPLES' SELF-HELP HOUSING CORP., 1990 ANNUAL REPORT 4 (1990).

[46] Peggy Wright, Remarks at the Univ. of Miss. School of Law Housing Law Workshop (Nov. 15-17, 1991). Another example is the program operated by the Arkansas Delta Housing Development Corporation located in Forest City, Arkansas. In this program, six families are grouped together to help each other build houses. This program relies on sweat equity and has been highly successful in providing low income housing for families in need. *Id.*

[47] Susan Diesenhouse, *Community Rises from Boston Slum*, N.Y. Times, November

Each of these examples demonstrates that programs which foster the empowerment of the families can help those families become confident in their abilities. When families are given the opportunity to take responsibility and control of their lives, the families become independent and learn to trust each other.[51] The family nurture program should help the families build trust with one another by ensuring that families are truly accepted into the group and are free to say what they really think and feel.[52] This can be done by using group building and role playing exercises.

At the same time, however, the affordable housing program must be careful to allow the group to develop its own agenda of concerns. The affordable housing program may act as a facilitator, to help the families identify those concerns, but it cannot substitute its judgment for the group's.[53] Also, the pro-

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15, 1987, § 1 at 59, col. 1.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Tierque, *supra* note 17, at 44.

[52] ANNE HOPE AND SALLY TIMMEL, TRAINING FOR TRANSFORMATION 6 (Book 2, 1984).

[53] ANNE HOPE & SALLY TIMMELL, TRAINING FOR TRANSFORMATION 14 (Book 1, 1989).

gram can help the families set their goals clearly and organize for action. However, the program must always remember that, in order for the family nurture program to be effective, the work of the group must be done by the families themselves.[54]

E. Family Nurture Under the Habitat for Humanity Program

Under the Habitat for Humanity program, each affiliate is required to establish a family nurture program which is designed to provide support and assistance to the homeowner families. The goal of the program is to assist the families in becoming independent and in becoming a part of a larger community of families which help each other.

This program is typically run by the family nurture committee. The committee is composed of six to eight members, some of whom may be members of the local board of directors, and others of whom may be individuals from the community who work with families in need, such as pastors, teachers, health care workers, and social workers. In addition, the committee may have as members Habitat homeowners who have successfully adjusted to the requirements of home ownership.

In implementing the family nurture program, the committee works closely with the family selection committee because the selection process is the first step in the nurture program. In addition, many of the aspects of the selection process, such as the sweat equity requirements and the family visit, are part of the nurturing process. Therefore, while the family selection committee does not have actual responsibility for family nurture work, close cooperation between the two committees is needed because the nurture work begins before the house is built, and continues long after the family has moved into their new home.

Habitat for Humanity relies on three principal components to carry out the nurturing process. These are educational workshops, the mentor or family friend program, and the homeowners' association. Through these programs Habitat for Humanity teaches its families problem solving skills. Moreover, Habitat for

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[54] HOPE & TIMMEL, *supra* note 52, at 6.

Humanity holds the families accountable to their commitments through such measures as ensuring that the family completes its sweat equity requirements and makes its house payments on time.

1. Workshops

Like many Habitat for Humanity affiliates, one of the principal family nurture tools used by both Miami HFH and Coahoma HFH are educational workshops. These workshops are held on issues such as home maintenance and repair, legal aspects of home ownership, and budgeting. The families are required to attend these workshops before the house is transferred to them, and the family may be given credit, for sweat equity purposes, for the time spent in the workshops.

As mentioned above, the legal workshop concentrates on the meaning of the legal documents involved in home ownership, such as the mortgage, deed, etc. The budgeting workshop concentrates on helping the family to plan their monthly budget, to save for anticipated expenses, and to avoid common pitfalls, such as acquiring too much debt in connection with the furnishing of the new house. The home maintenance and repair workshop concentrates on the need to perform preventive maintenance on the home, such as painting outdoor wooden surfaces, and certain safety concerns, such as checking a gas furnace for malfunctions on a yearly basis.

The skills and knowledge are an important first step in supporting the family as it develops their independence. Follow up and reinforcement of the knowledge and skills are an important part of family nurture and can help the family develop greater self-confidence.

2. The Mentor or Family Friend

Another important aspect of the Habitat program is a family mentor or friend. Under this part of the nurture program, when a family is approved to receive a Habitat house, a member of the family nurture committee or other Habitat volunteer accepts the responsibility of working with the family as a mentor.[55] The mentor introduces himself or herself to the family soon after the family has been chosen, and begins building a relationship with the family. The mentor then helps the family throughout the homebuilding process. For example, the mentor may provide transportation to and from the construction site, help the family perform its sweat equity, provide child care while other family members are performing the sweat equity, and provide any other help which a friend would provide. The mentor meets regularly with the family in order to ensure that the family understands the Habitat for Humanity program and to address any concerns the family might have.

The mentor also helps the family plan for the move to their new house. This would include reminding the family to notify their current landlord of the move at the appropriate time, to transfer utilities to the new home, and to plan a budget for the move. The family must remember to save for such expenses as security deposits for utilities for the new home, renting a moving van, having furniture cleaned, or if necessary, replaced, and buying such necessities as curtains, etc., for the new home. The mentor helps the family formulate these plans. The mentor should also offer to help the family move. Finally, the mentor continues to provide support and help during the weeks and months following the family's move. This time is often very bewildering to the family, especially if they are moving into a new neighborhood. The mentor should be there to reassure and support the family and to provide any assistance they may need. Finally, if the family suffers through difficult times, the mentor provides emotional support for the family through such difficulties.

The principal purpose of the family friend or mentor program is to provide support and assistance to the family. The process of acquiring a home can be daunting even to a middle class family with ample financial and other resources. It can be even more intimidating to a low income family who have never owned a home nor had family members who owned a home. Because most mentors have experience in purchasing a home, the mentor can help the family through the process. The mentor can also serve as a positive role model for the family, helping them to develop problem solving skills. For these reasons, the best person to assume the role of mentor in many cases is another homeowner who has successfully completed the process. Another homeowner is in the best position to know what the family is feeling, and what assistance they may need. In most cases, another homeowner has had to confront the same problems.

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[55] Some affiliates assign a member of the family selection committee to work with the family after they first file an application for a home. The member serves as the family's advocate throughout the family selection process. This ensures that someone is helping the family to understand and to participate fully in the process. It also ensures that the needs of the family are not being overlooked. This approach recognizes that for many low income families, the application process can be intimidating.

3. Payment Collection Process

An important part of the selection process is that a family have the ability to pay for their home. Habitat for Humanity requires each of its affiliates to develop delinquent payment procedures which are consistent with the goals of a family nurture program. The families which are selected for Habitat for Humanity homes do not have many discretionary financial resources and are likely to face a financial problem in the future. A delinquent payment is likely and should be addressed by the affiliate in a way which encourages a family to assume responsibility for their commitments. At the same time, there should be compassion and understanding in the response.

Habitat for Humanity believes that the repayment procedures are a critical element in the family nurture process. First, it ensures that the family develops a history of making payments on time and of taking their responsibilities seriously. Second, if the family does fall behind in their payments, the program provides a way for the Habitat affiliate and the family to address the problem in a constructive and caring way. This is generally done in conjunction with the family friend or mentor. Third, because house payments are used to build other Habitat houses, it allows the homeowners to participate as contributors to the Habitat program and gives them an opportunity to help others in need. Finally, the delinquent payment procedures and foreclosure provisions show that there is a benefit to the family in following their commitments. Otherwise, families who do make their payments on time would not feel that they were receiving any benefit from so doing.

Some affiliates provide that if the family falls behind in their house payments, the family friend or mentor should meet with the family and try to work out a solution. However, Miami HFH feels that asking the mentor to take such action is inconsistent with his or her role as a friend. Therefore, under Miami HFH's family nurture program, the mentor is not asked to get involved in the collection of mortgage payments. The mentor is not supposed to ask for payment or inquire as to when the payments will be made. If the homeowner family is delinquent, the finance committee informs the mentor, however, the mentor's role is limited to helping the family if they need assistance in budgeting their expenses and providing support and assistance to the family during the crisis, just as any friend would.

Neither Miami HFH nor Coahoma HFH have had to foreclose on a house. Both affiliates have been able to work with the families to ensure that house payments are made on a timely basis.[56] Overall, Habitat for Humanity affiliates have experienced only a 1% foreclosure rate on houses. Unfortunately, however, some Habitat affiliates have had to foreclose on homes. In some cases, this is because families have been unwilling to assume the responsibilities that home ownership implies. In others, the family has simply lacked the resources necessary to maintain the home. In the event of foreclosure, the Habitat affiliate is expected to help the family obtain adequate substitute housing before the family is required to leave the Habitat home. In addition, the affiliate is expected to assist the family with the move. These steps not only provide material assistance to such family, but it does not destroy the trust that has been created between the affiliate and the remaining homeowner families. It also ensures that the family is not returned to the same circumstances from which they came.

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[56] As part of its family nurture program, Miami HFH has developed the following repayment procedures:

1. Monthly house payments are due and payable on the first day of the month.
2. A grace period of 15 days is given, after which the payment will be considered delinquent.
3. A late fee of $25 is charged on each late payment for each month that it is late.
4. If a payment is still delinquent after two months, the homeowner should meet with the finance committee and work out an acceptable schedule for bringing the payments up to date. If the homeowner meets this schedule, the late charges may be waived at the option of the finance committee.
5. If the homeowner is still delinquent after three months, the Board of Directors may elect to start foreclosure proceedings.
6. The finance committee continues to work with the family during the foreclosure proceedings to see if a payment plan can be worked out.

4. Homeowner Associations

The final and key element of Habitat for Humanity's family nurture program is the development of an effective homeowners' association by the families, with the assistance of the affiliate. The homeowners' association is the catalyst by which the families become independent and no longer need the help of the Habitat for Humanity program. The association uses the skills learned from the Habitat program to find new solutions to other problems which the families face. For example, the homeowner organization for one Habitat affiliate has established an emergency fund to assist families if they are experiencing financial difficulties. Another homeowners' association has reached out to non-Habitat families in the neighborhood who want assistance in improving the condition of their homes. In both cases, the families have moved beyond their immediate housing problems to see if there were any other means by which they could help each other as well as other people in the community.

Homeowners' associations work best when all the homes are located in one area, and the homeowners are neighbors. Therefore, in the case of larger affiliates, which build in several neighborhoods, the affiliate may establish homeowner associations in each neighborhood. However, even when the building sites are scattered, affiliates have been able to sponsor effective homeowner associations. Habitat for Humanity has learned that the important thing is for the families to begin acting together as a group in order to become independent of the Habitat for Humanity program.

The success of this approach is illustrated by Miami HFH's project in Liberty City. Since the Jimmy Carter Work Project was held last June, work has continued at the Liberty City building site. The families have completed construction on their homes and moved in. Several families have held house warming parties for the neighborhood. At their own initiative, the Habitat homeowners have formed a homeowners' association, and are working on issues such a whether to place a fence around the Habitat Homes subdivision.[57] The families are also working to help complete the YMCA day care center. Thus, the families are already beginning to take action and make decisions on their own. From these first steps, the homeowners can go on to tackle other problems which they face as residents of their community. The volunteers at the work project may have built the houses, but the homeowner families are now building their neighborhood.

V. Conclusion

In the past, affordable housing programs have concentrated too many of their resources on the construction of physical structures for families in need and too little effort on helping families overcome some of the underlying problems associated with being poor. These include feelings of inadequacy, despair, and a lack of trust in others. These feelings, which are reinforced by a government bureaucracy which is not always responsive to the needs of the poor, serve as an impediment to the families helping themselves. Therefore, in order to be successful, an affordable housing program must overcome these feelings and help the families gain control over their lives.

The affordable housing program can accomplish this goal by establishing a family selection procedure which requires families to contribute to the construction of their homes and the homes of others. Habitat for Humanity and other self-help programs rely on the family selection process and a sweat equity program as a way of raising the family's self-esteem and helping them to work with their neighbors to solve their housing problems together. Finally, an affordable housing program must establish a family nurture program which, through such techniques as educational workshops, family mentors, and tenant or homeowner associations, teaches the families participating in the program basic problem solving skills. Bolstered by the confidence which they have gained by working together to solve their housing problems, the families can then use the skills learned under the affordable housing program to solve other problems in their lives.

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[57] Dirk Holkeboer, *Miami's Liberty City Homeowners Settle into Their New Community*, Habitat World, Oct. 1991, at 16.

AN ESSAY ON COMMUNITY LAND TRUSTS: TOWARDS PERMANENTLY AFFORDABLE HOUSING

*David M. Abromowitz**

INTRODUCTION

Over the course of this century, Americans have poured hundreds of billions of public and private dollars into housing. Especially during the past 50 years, public investment and incentives — direct and indirect — have gone into stimulating creation of a "decent home and a suitable living environment for every American family."[1] Public housing investment, once substantial, has provided over 1 million basic housing units in hundreds of cities and towns.

Production-oriented incentives for private developers — such as the long term, low-interest mortgages for multifamily housing of the so-called 221(d) (3) program[2] produced several hundred thousand units nationwide. Direct Federal (and in some cases state) rental subsidies, such as the Section 8 certificate program,[3] further underwrote private housing production. Federal government guaranties and credit enhancement, spawned through quasi-public bodies like the Federal National Mortgage Association, brought vast pools of capitol into the single and multi-family residential mortgage markets. Low or no down payment guaranteed Veterans Administration loans opened up home ownership options to millions of returning soldiers in the aftermath of World War II and since. And tax incentives, from the ubiquitous home mortgage interest deduction to the accelerated depreciation for real estate of the 1980s to the low-income housing tax credit hanging on into the 1990s, have directed capital investment into housing through preferential treatment.

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[1] National Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949).

[2] Section 221(d)(3) of National Housing Act, 12 U.S.C. § 1715(d)(3) (1988). Many of the programs referred to here are more fully described in B. Jacobs, K. Harney, C. Edson & B. Lane, GUIDE TO FEDERAL HOUSING PROGRAMS (BNA Books, 1982).

[3] Housing and Community Development Act of 1974, 42 U.S.C.A. § 1437f (1988).

Few would deny that the powerful combination of these and other public subsidies enormously expanded the overall supply of housing beyond what and unsubsidized market would have likely produced. But many would question whether these dollars and efforts have really fulfilled their goals and aspirations.

The crisis in access to housing for lower income persons and families, and its corollary of growth in the population of homeless and near-homeless Americans in all parts of the country, is well analyzed and documented in other papers of this symposium.[4] One statistical example suffices. A recent study of the "affordability index" of housing in a number of urban areas showed that in many locations, the median family earns and income that is less that the median-priced house in the same locale — and in some median family income is less than half of what is needed.[5] Such statistics indicate that the massive public investment in housing has not been preserved.

Against this background, the community land trust model emerged. Community land trusts offer both a practical means of preserving housing affordability for the long term and a reconceptualization of the notion of home ownership aimed at broadening and stabilizing access to shelter. To elaborate on how and why the community land trust model does so, this article will first describe the model in some technical detail, and compare it to common alternatives. A summary discussion of several common legal questions will follow. Finally, several of the conceptual and philosophical implications of this model will be noted.

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[4] *See* Deborah H. Bell, *supra* The University of Mississippi Housing Law Clinic: A Local Law Office and Regional Law Center, 61 MISS. L.J. 501 (1991).

[5] *Pinch on the Poor, Boston Globe*, (Oct. 17, 1991), at 1 (citing study by Harvard's Joint Center for Housing Studies).

I. The Community Land Trust Model[6]

To understand the community land trust (CLT), we must consider both a structure of property ownership and the nature of the owners. In the CLT model, real property ownership is split between title to the land on the one hand, and title to the housing and other improvements on the other. In a simple example of the single-family house, title to the land under the house is held by the CLT. Title to the house would be held by the individual(s) who we would otherwise think of as the homemaker.

The relationship between the CLT as owner of the fee interest in the land and the homeowner is governed by a ground lease, with the CLT as ground lessor and the homeowner as ground lessee. The homeowner's fee interest in the improvements is subject to the terms of the ground lease. The ground lease format is a common one in commercial transactions. At bottom, a ground lease is a long term lease to a party willing to invest in the use of the land while the fee owner/lessor retains the ultimate reversionary interest at the end of the lease term. In some parts of the country — Baltimore and Hawaii are two examples — ground leases are familiar in residential housing as well. The CLT model adapts this lease format; in order to carry out its overriding purpose of preserving the long-term affordability of housing, a CLT ground lease also contains limitations on both the resale price and the use of the house located on the leased land.[7]

A. *Price Limitations*

Perhaps the most central provisions of the ground lease are those which allow the house to be resold only at a "limited equity" price arrived at through a predetermined formula. The most limited such formula would be designed to return to the homeowner only her initial capital investment. At the other end of the equity-return spectrum, the formula would allow a sale for virtually full market value, prohibiting only the most extreme of windfalls. CLT pricing formulas typically fall in between these extremes; most permit the homeowner to receive a modest amount of any market increase in value in the home upon resale. Generally, the formula will provide for a sale price based upon the initial capital outlays by the homeowner (i.e., the homebuyer's down payment and closing costs), plus the cost of most improvements made by the homeowner, plus all or some of amortization of mortgage principal). The sum of these capital items is then adjusted for general price inflation (rather than specific local housing price inflation) to keep the homeowner's contributed capital at pace with the non-housing cost of living.[8]

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[6] This section is adopted from the authors earlier work found in Metropolitan Area Planning Council, *Limited Equity Homeownership* 11-20 (Metropolitan Area Planning Council, 1990).

[7] A fuller, detailed discussion of legal and related issues is found in Institute for Community Economics, *The Community Land Trust Legal Manual* (Institution for Community Economics — 1991), which can be obtained from ICE, 57 School Street, Springfield, Massachusetts 01105 [hereinafter *Legal Manual*]. A model CLT ground lease [hereinafter Model Lease] is set out in the *Legal Manual*.

Obviously, the more limiting the resale price provisions, the more likely that the house will remain affordable to future generations of low-income buyers. A lenient formula tends towards the present unrestricted market situation; a house is sold at a subsidized price (or the carrying costs written down through operating subsidies, or both) to the first buyer without resale limitations only for a short time period. When the house is sold, the particular homeowner lucky to have gotten into the housing market walks away with the windfall, while the market price probably puts that housing unit beyond the economic reach to the next lower income family.

B. Use Limitations

Resale formulas only deal with the price at which homes on CLT land can be bought and sold; they provide no assurance that low cost housing will be allocated to lower income occupants. The ground lease therefore typically includes provisions designed to ensure that its allocative purposes are carried out.

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[8] Some CLTs, for simplicity or other reasons, use an appraisal-based formula instead of the one described here. In brief, the market price of the house is determined at initial purchase. At sale, the house is appraised. The homeowner/lessee is allowed a preset percentage (e.g., 25%) of the market increase price.

Typically, CLTs are housing-oriented, and will require residential use of the home. In this regard, the CLT will have to address many typically zoning-related issues, such as whether "home occupations" will be allowed. In addition, CLTs generally provide for owner occupancy except in cases of personal hardship. This is in part to avoid problems and incentives of absentee ownership and in part to avoid owners trying to circumvent the equity limitations by renting at full market rates. Most importantly, CLTs normally target all or a substantial portion of the housing units on CLT land for occupants who are of low and moderate income, at least at the time of initial occupancy.

C. Enforcement Mechanisms

Provisions dealing with the resale price limitations, use restrictions and the like are not self-enforcing. In order to carry out its purpose, the group of governmental agency including such provisions in a housing transaction needs to be in position to monitor the adherence to the agreed upon terms. The ground lease format used by a CLT generally offers both a legally viable and a practical mechanism for such long term monitoring.

The legal mechanism is the relatively familiar process of declaring a default under the terms of the ground lease and, if the default remains uncured, obtaining judicial relief through typical landlord-tenant summary process.[9] The exact procedural details and substantive requirements will differ from jurisdiction to jurisdiction, but much can be said of elements in common. The ground lessee's rights of possession of the land depend upon compliance with the lease terms. Failure to comply gives rise to the right of the landlord to evict the ground lessee or seek other remedies, such as damages or injunctive relief, where appropriate.

The impact of an eviction upon the lessee's rights to the buildings requires careful attention. The fee interest of the lessee in the buildings is intended to be conditional upon the continuation of the lease term. That is, a termination of the lease either by natural expiration or as a result of a default could result in the forfeiture of title back to the CLT and a merger of the estates. The ground lease could provide, to soften this forfeiture of the ground lessee's equity in the housing, that upon termination the CLT will purchase back the buildings at some full or discounted portion of the then allowable resale price. (Clearly, the CLT would not want termination to trigger a purchase requirement at full market price, or the affordability provisions could be easily circumvented.) However, the CLT might not be in a financial position to make such a repurchase, even at a substantial discount, as the timing of a default is not within the CLT's control. Consequently, CLT's often seek to have the ground lease provide that a termination due to a default triggers a complete forfeiture, while a termination due to non-renewal of the lease results in a "buyout" of the lessee's equity at a substantial portion of the permitted resale price.

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[9] *See* Deborah H. Bell, *The Mississippi Landlord-Tenant Act of 1991*, 61 MISS. L.J. 527 (1991) (discussion of Mississippi's new landlord-tenant act).

Lease termination is the most dramatic remedy. Consequently, CLT's provide for a less dramatic and more tailored means of keeping resale limitations in place by reserving a "preemptive" option, also known as a right of first refused, to purchase the housing. If the homeowner/lessee wished to sell her house, under the lease she will be required to give the CLT notice of her proposed sale. She might have a particular buyer in mind at a negotiated price, in which case the CLT will review the terms of the proposed sale for the prospective buyer's eligibility as a low or moderate income resident and compliance of the proposed price with the price allowable under the equity formula. If no particular buyer is contemplated, the CLT will in effect be asked to be the buyer. In either case, before a sale can be completed the CLT will have the option to purchase the housing at the formula price (or, if lower, then market value). In this sense, this option preempts any attempt to transfer the housing to a third party in a transaction that would violate the lease terms. Several other mechanisms are commonly used to carry out long term affordability programs.

1. Deed Restrictions

Deed restrictions or covenants that "run with the land" and bind subsequent owners, could be inserted in the initial deed of an affordable property to a private owner.[10] These restrictions would limit in some way the resale price of the property and/or could give the initial seller (presumably a public body, a nonprofit organization, or in some cases a private entity) a first option to purchase at a restricted price when the property is offered for sale. A right of first refusal is similar, but generally puts the burden on the owner of the property to offer it for sale to the holder of the right of first refusal (in this case, the initial seller) before offering it to anyone else. Both a purchase option and a first refusal can be distinct from deed restrictions, in that they need not be included in the initial deed from the seller to the first buyer; rather, they can be the subject of a separate agreement. Whether such restrictions are in a deed or a separate covenant, the initial seller would want the right to enforce the restrictions against subsequent owners, not just the initial buyer.

2. Recorded Mortgage Lien

The seller of a subsidy source might require the buyer to grant a mortgage lien against the property. The amount of the lien typically is calculated according to the prescribed formula designed to enhance affordability. For example, the lien might be for the difference between the actual sales price in a future sale and the intended restricted sale price, thereby capturing any surplus. Alternatively, the lien might secure the difference between the fair market value of the property when sold to the first owner and the price actually paid by the subsidy as adjusted for inflation, in effect recapturing just the initial subsidy. The lien becomes due and payable upon an unpermitted sale or transfer, such as a sale at too high a price or to an ineligible buyer.

3. Limited Equity Cooperative

If multi-family housing is involved, creation of a limited-equity cooperative might be required as a condition of the initial subsidy or sale transaction. The property is owned by a corporation created under state law, sometimes under specific statutes for such cooperatives.[11] The shares of stock in the corporation are owned only by persons who also hold the right to occupy a unit in the building. Like shareholders in other corporations, the unit owner votes for directors, serve as officers and vote on major decisions involving the corporation. The right to live in a unit is embodied in a perpetually renewable lease (a "proprietary lease"). The proprietary lease and stock can only be transferred as a package, and together comprise the interests that a unit owner buys. What makes a cooperative corporation "limited equity" are provisions in the Articles of Incorporation, By-Laws, stock certificates and proprietary leases which restrict selling the unit at fair market value. Instead, a limited price formula similar to that used in the other affordability mechanisms is built into the documents, and a sale contrary to such restriction is void.

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[10] *See infra* note 12.

D. Comparison of Methods

While each of the mechanisms discussed above to some degree promotes preservation of affordable housing, two primary comparative questions need to be addressed:

(1) To what degree are the restrictions imposed legally enforceable?

(2) Given the degree of legal enforceability, what are the practical strengths and weaknesses of each structure?

To fully appreciate the CLT model, a brief review of each common mechanism is useful.

1. Deed Restrictions

Any mechanism to preserve affordable housing must look beyond the present to the future. Legally, restrictive covenants are prone to certain infirmities for the long term. To be fully enforceable, they need to meet several arcane tests such as whether the restriction was made between parties in the proper degree of privity, is of the kind that "touches and concerns" the property, or whether the holder of the restriction has a parcel which is benefitted by such restrictions. This can be quite problematic where the restrictions run, for example, to a governmental agency which has no land that it owns in close proximity to the burdened land.[12] In addition, the duration of deed restrictions can be limited either by the common law doctrine of "changed circumstances" or by explicit statutory proscription.[13]

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[11] MASS. GEN. LAWS, c. 157B (1992).

Even if all the legal obstacles to enforcement of the deed restriction are satisfied, as a practical matter, they are often hard to enforce. The holder of the restriction would need an ongoing relationship to the property in order to discover a possible violation in advance. It might be hoped that, in practice, the restriction would cloud title and render the property less marketable, thereby preventing an outright sale in violation of the terms of the deed covenants. However, there are other aspects of preservation of long term affordability that can be circumvented without an outright sale (for example, leasing at full market rents), without a likely opportunity for the cloud on title to inhibit a violation. In addition, if the difference between the allowable limited equity resale price in the covenant and the then market price is great, the burdened owner of the property has a great financial incentive to seek out ways to avoid the terms of the deed covenants. There may well be a speculative purchaser who would be willing to pay above the allowable limited equity resale price but below market price, with the difference serving as either the reward for the risk that the restriction will ultimately be enforced or the incentive to spend substantial sums on a legal challenge to enforceability.

2. Mortgage Lien

Generally, a mortgage lien is not subject to the same enforceability issues as a deed restriction. No special independent privity is required, and the lien is not limited to securing things that "touch and concern" benefitted parcels. Also a mortgage usually is not considered subject to any limitations on duration.[14]

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[12] *See generally* CUNNINGHAM, STOEBUCK & WHITMAN, THE LAW OF PROPERTY 467-496 (West 1984). *See also*, Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243 (Mass. 1979). Some courts have stated that to "run with the land" consent must "enhance its value and conger in benefit" or be a burden which "may be imposed consistently with policy and principle." Mendrop v. Harrell, 103 So. 2d 418 (Miss. 1958); *see also* Union Exploration Partners, Ltd. v. Amsouth Bank, 718 F.2d 552 (S.D. Miss. 1989).

[13] *See, e.g.*, AMERICAN LAW OF PROPERTY § 9.22 (A.J. Casner ed. 1952); *see also* MASS. GEN. LAWS c184, § 27 (1992) amended by Ch. 520 of the Acts of 1990 to provide for a class of "affordable housing restrictions" that would be exempt from the statutory durational limitation of 30 years.

Still, to be enforceable, a mortgage generally must secure a promise to pay a specific sum of money or an obligation that can be calculated according to a fixed formula. For example, the typical house purchase mortgage secures the amount borrowed, plus interest, plus possible costs of enforcement and amounts spent on protecting the security against waste. If some independent obligation is included in the mortgage — for example, if the mortgagee secures an option to repurchase the property at a fixed price — the obligation might be found invalid. That is, the repurchase option might be viewed as an obligation that cannot be converted into or calculated as an amount of money that the borrower can pay off to remove the lien. If the mortgage cannot be paid off, the restrictions preventing such payoff may be struck down under old common law doctrines that generally serve to allow a borrower to redeem her land from a lender at some point in time. The law in this area is, unfortunately, somewhat murky.[15]

There are also practical problems with using a mortgage lien to preserve the affordability of housing. A mortgage obligation ultimately is fairly easily circumvented. The original buyer knows that if he or she sells at full market price, at worst the excess profits will be turned over to the mortgagee. Furthermore, there is some chance the mortgagee will not enforce the mortgage; as in the case of deed restrictions, there may be no ongoing oversight or warning signals to alert the mortgagee of a sale. Some groups have attached large prepayment penalties if the mortgage amount is paid before the full term of the mortgage. If the appreciation in the property is greater than the penalty, however, there is still an incentive to the property owner to sell at full market price and pay off the mortgage. If the prepayment penalties are so large as to be greater than the full market price, the mortgage may run afoul of doctrines such as those discussed in the preceding paragraph.

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[14] However, under laws such as Massachusetts General Laws c. 266, a mortgage cannot be foreclosed after 50 years from when it was recorded in the public record unless properly extended.

[15] *See, e.g.*, Humble Oil & Refining Co. v. Doerr, 123 N.J. Super. 530, 303 A.2d 898 (1973) (discussing "clogging the equity of redemption"); *see also* Pawtucket Institution for Savings v. Gagnon, 475 A.2d 1028 (R.I. 1984) (valid mortgage securing promise to build apartment building).

Looked at another way, the mortgage approach, even if actually enforced, allows a late purchaser to "buy out" the property from the public. At the outset, the mortgagee knows the market value of the property compared to the price the initial purchaser is paying. At that point, it is possible to calculate whether it is more beneficial to sell off the property up front to the highest bidder and use the proceeds for a public benefit. If the mortgagee puts a mortgage on the property, the buyout previously described may occur at a time when the market value has dropped (or not kept pace with inflation), which will yield the mortgagee less money to replace the property which has now been lost to the market. This makes it still more difficult to set a formula for the amount of the lien that matches well the goal of preserving affordability. Mortgages are therefore rather blunt instruments in an area needing a more finely calibrated approach.

3. Limited Equity Cooperative

As noted earlier, in a limited equity cooperative, the affordability restrictions are contained as limitations on the sale of stock as well as restrictions on assignment of the leasehold interest. Courts have been more willing to uphold restrictions of various kinds in a cooperative setting as leasehold restrictions (as compared to restrictions on a fee interest in real estate). Similarly, the sale of stock is considered a sale of personal property and, and restrictions in this area also have generally been widely enforceable.[16]

Questions about the ultimate enforceability of equity limitations in a cooperative are again probably more practical than legal. The restrictions exist only if they are included in the Articles of Organization, By-Laws and other governing documents of the cooperative corporation. Such documents, however can be amended. The corporation is governed by its shareholders and their elected board representatives. As market and personal financial pressures mount on cooperative members, even those who were most enthusiastically dedicated to the concept of limited equity at the start may find themselves wondering if there might not be some way to change the resale price limitations. The cooperative documents can require a "super majority" vote, such a unanimous consent to a change in the resale price formula, but even this obstacle may not prevent such a change in the future. As a result, many advocates of limited equity cooperatives are looking at ways to couple them with oversight by an independent third party which would have a veto power over doing away with the limited equity restrictions. One such mechanism is establishing in the initial Articles and By-Laws that any amendment (or any amendment related to the limited equity aspects of the cooperative) requires approval of the project sponsor or the granting entity before that amendment can be effective. Another structure would be to combine two methods discussed here and have the land underneath the cooperative be owned by a CLT.

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[16] However, in Mississippi and some other states, restraints against alienation on personal property apparently are treated like real property. *See* Sanders v. Hicks, 317 So. 2d 61, 63-64 (Miss. 1975).

4. Ground Lease/Land Trust

Any of the restrictions which could be imposed in deed or mortgage covenants or in a cooperative's documents could instead be included in a CLT ground lease. Yet, because of the technical and practical distinctions between a lease format and the other mechanisms reviewed above, such restrictions are more likely to be enforced for a longer time in a lease.

The ground lessor's ongoing interest in the property is clear, minimizing concerns that a distant party not presently connected to the property will undermine the project thus restricting productive use. The duration of the restrictions is finite, measured by the term of the lease. Functionally, because of the CLT's ongoing involvement with the property through collection of ground lease fees and continued land ownership, the CLT is more likely to be in a position to observe violations and to anticipate conditions that could lead to violations. And procedurally, the commonality of a summary process lease enforcement action is a great advantage over the probably unfamiliar pleading involved in enforcement of, for example, deed restrictions.

E. Organizational Structure and Long Term Enforcement

Any legal device governing affordability requires some entity to maintain oversight and be ready to enforce the violated terms in the future. The CLT's organizational structure tends to contribute to its ability to carry out long term monitoring. As noted above, a CLT is typically a non-profit, tax exempt corporation.[17] Most CLTs try to reflect their balance between community participation and individual control by having a membership open to adult residents of a defined geographical area who wish to further the charitable purposes of the CLT. Homeowners/leaseholders are often automatically members.

The CLT board is typically composed of elected representatives of three constituencies: non-resident members with particular skills or interests valuable to the CLT (e.g., architects, planners, lenders); representatives of the community at large, sometimes including public officials; and leaseholders. Such multiple interest on the board are intended to keep the CLT from moving too far in the direction of either community or individual interests. Having leaseholders on the board insures that the CLT cannot take actions in its role as "landlord" without the opportunity for consideration of the impact on lessees. On the other hand, lessees do not make up a majority on the board, thus probably thwarting any temptation to have the CLT abandon maintenance of the price and other limitations that some or even all leaseholders might want to see removed. The CLT therefore acts as a relatively independent check on efforts to dilute affordability maintenance provisions.

Institutionally, CLTs generally are focused in their purpose of preservation of long term affordable housing. This focus distinguishes CLTs from the many other participants — government agencies, for-profit and non-profit developers, lenders —

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[17] An excellent overview of legal and organizational considerations for groups carrying out similar functions is Salsich, *Non-profit Housing Organizations*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y, 227 (1989).

who tend to be more intent on the initial production of the low income housing supply. The specialization of the preservation function by CLTs is intended to enhance both technical capacity and the commitment of its membership to perpetuate its purpose.

II. RESTRAINTS, PERPETUITIES, AND CLT LEASE PROVISIONS

No legal device is challenge proof. In the CLT context, the combination of rather restrictive provisions regarding resale prices and the long term nature of the preemptive option often give rise to several types of questions as to the enforceability of the CLT structure by lawyers and others when first introduced to the CLT model. These concerns commonly focus on whether the resale price limitations goes too far in limiting the equity of the lessee/homeowner, and whether the preemptive option is of too long a duration. In doctrinal terms, the first concern is one of whether the lease provisions run afoul of the rule against unreasonable restraints on alienation. The second concern is commonly cast in terms of whether the option violates the Rule Against Perpetuities.[18]

It appears that there are no reported cases addressing directly the specific provisions of the CLT model. However, by analogy to the treatment of similar types of restrictions and mechanisms in the reported cases and the Restatement of Property, it seems likely that the CLT affordability provisions would generally be found enforceable by modern courts.[19] This conclusion deserves some brief elaboration here.

The resale price limitation could be viewed as potentially violative of the doctrine against restraints on alienation. Arguably, it creates a disincentive to the lessee to sell when compared to a higher market price that purportedly would be available without the restriction. Whether a given restriction on real property will be found unduly restrictive of alienability is a test of reasonableness that looks to a variety of factors. As summarized in the Restatement of Property at Section 406, factors indicating reasonableness are:

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[18] Mississippi currently follows the "wait and see" approval to Rule Against Perpetuities questions. C&D Investment Co. v. Gulf Transport Co., 526 So. 2d 526, 529 (Miss. 1988).

[19] For a fuller survey of the applicable law, see the discussion by Professor Deborah H. Bell set out in the *Legal Manual*. *But see* Seeger, *The Fixed Price Preemptive Right in the Community Land Trust Lease: A Valid Response to the Housing Crisis or an Invalid Restraint on Alienations?*, 11 CARDOZO L. REV. 471 (1989). A detailed analysis under Florida law is found in Pastel, *Community Land Trusts: A Promising Alternative for Affordable Housing*, 6 FLA. J. OF LAND USE & ENVTL. L. 293, 301-12 (1991).

> 1. The one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint;
> 2. the restraint is limited in duration;
> 3. the enforcement of the restraint accomplishes a worthwhile purpose;
> 4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained; and
> 5. the number of persons to whom alienation is prohibited is small.[20]

Generally, however, courts have found restrictions on resale even more drastic than those contained in a CLT ground lease to be valid in the context of both condominium and cooperative forms of housing ownership.[21] The reasoning is that in such interdependent ownership forms such limitations serve a countervailing purpose of creating or enhancing a desirable limiting environment and arrangements and therefore make the initial purchases of the housing units more likely. That is, rather than limiting alienability, when looked at in overall context such restrictions actually enhance alienability. When governmentally endorsed programs are involved, such as is often the case in CLT arrangements making use of public subsidies, the public policy goals facilitated by such restrictions are still more likely to outweigh any concerns about alienability.

Such an analysis is particularly apt in the CLT context. Because of the income level often served by CLTs, many of the homeowners would not otherwise be able to afford resold units were the price provisions not in place. Rather than limiting the number of prospective purchasers or real property, the restrictions expand the potential pool. As a corollary, the departing seller is not typically someone who otherwise would have purchased an unrestricted house and is now unduly limited by a bargain mistakenly entered into. The CLT documents and process attempt to reinforce an explicit acknowledgement by the lessee/homeowner that the trade-off of future equity for present access to stable housing was understood and as freely entered into as any transaction in the market ever is.

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[20] RESTATEMENT OF PROPERTY § 406 (1982).

[21] In the case of Franklin v. Spadafora, 477 N.E.2d 1244 (Mass. 1983), for example, the Massachusetts Supreme Judicial Court upheld as reasonable a condominium by-law which restricted to two the number of units in the building any one person could own.

Regarding the rule against perpetuities, the specific focus of concern is usually that the preemptive option is not confined to a duration of a "life in being plus 21 years." Numerous responses are possible to allay this concern, depending upon the particular jurisdiction and its current version of the Rule. Some take the view that "in the United States the better view has been" that options to purchase realty appendant to a leasehold estate are not subject to the Rule Against Perpetuities.[22] There are various rationales for this view, such that the purchase option is vested at creation, that it is in the nature of a contract rather than a property right, or that such an option does not unduly hamper any of the policies that the Rule was intended to foster. Where any doubt lingers, most CLTs will use "savings clauses" in the ground lease and will also supply a defined group of "measuring lives" in the lease terms to preserve the lease as a whole and the option in particular from attack.

III. PROPERTY AND VALUE

Much of the foregoing has viewed the CLT approach to housing as a technically and practically superior method of dealing with basic affordability concerns. On that basis alone, more widespread use of CLTs as affordability caretakers of housing initially developed for lower income residents would be both prudent and fiscally conservative. But the significance of the CLT form of ownership goes to a deeper level of reconceptualization of property.[23] A full exploration of the philosophical and conceptual implications of CLTs awaits a later paper; still, some preliminary observations are worth noting before concluding.

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[22] CUNNINGHAM, *supra* note 12, at 141.

For most of us, our only personal experience with real property rights comes neither through buying a home or renting an apartment. Our image of "ownership" focuses on the metaphor of a home being a castle. A property owner is popularly conceived of as having virtually complete control over a specific piece of land and the buildings on that land. With ownership, most people assume, comes the right to exclude anyone we want (through laws against trespass), to use the property without interference (through laws of preventing nuisances by other landowners), and to greedily sell, give away or leave the property to one's heirs (through laws governing contracts, gifts, and wills).

Yet, even the mundane act of renting an apartment tells most of us that property rights are not simple. The landlord, although still "owner" of the property being rented, has given up at least part of one of the rights of ownership, the right to exclude. Through the rental transaction, the tenant has acquired the right to come on the property, to use and enjoy the leased promises, at least for some period of time. It is now the tenant who, in general, has the right to exclude the landlords and others from the leased premises.

These examples illustrate the now almost trite metaphor of property not as a single and absolute right but rather as a "bundle of rights". This bundle contains a number of "sticks", such as:

- the right to exclude others;
- the right to sell or "alienate" the property when and to whom the owner chooses;
- the right to profit from its sale;
- the right to enjoy the property;
- the right to develop or change it;
- the right to the minerals beneath its surface; and
- the right to the air and sunlight overhead.

As society has become more and more complex, property has been increasingly allocated and disaggregated in ways which accommodate changing market needs — new sticks are located. A few more examples will serve to illustrate this well.

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[23] For an insightful discussion of similar issues primarily in the context of cooperatives, see Simon, *Social-Republican Property*, 38 U.C.L.A. L. Rev. 1335 (1991).

In urban settings, what appears to be a single, unified office building may in fact be a complex puzzle of relationships. One party may own the land underneath the building, which a commercial condominium association controlling common areas of the building, the building operations subject to a ground lease, a multitude of individuals owning the condominium units inside the building, and a development entity owning air rights above the building with the option to extend the building upward in the future. Similarly, another parcel of land located in a more residential area might be divided such that mineral rights below the ground are held by one party; homes on the ground are owned by a variety of individuals, subject to regulation by a homeowners' association and various common private deed restrictions on the right to build on various individual parcels; and open space in the parcel may be subject to conservation restrictions benefitting local government and non-profit conservation groups. Public rules such as local zoning and subdivision laws and regulations would still further qualify what an owner would be able to do with the property. And all of this is overlain by the numerous easements, licenses and leasehold interests commonly granted to utility companies and others with a limited need to cross over or use portions of the property.

With these realities in mind, the concept of so-called "limited equity" ownership can be understood not as an abrupt departure from basic property rules but rather as a part of a broader trend in modern real property law. "Ownership" need not be and all or nothing proposition. It is possible to structure forms of ownership which retain, with minimum curtailment, most of the traditional benefits of property ownership — such as security in possession, control over appearance and ability to leave the property to one's heirs. The essence of the limited equity concept is that by properly reallocating one of the typical attributes of ownership — the "stick" in the "bundle" allowing the right to sell in the market to anyone at the highest price — a lower-income homeowner can affordably achieve most of the ownership benefits without precluding the next low-income buyer from the same opportunity.

A primary goal of community land trusts and other forms of limited equity ownership is to address the growing shortage of affordable housing. Proper management of affordable housing created or held under a limited equity program could, over time, substantially alleviate the scarcity of affordable housing for a considerable period of time. Typically, the first owner of housing created under affordable housing program acquires the property at a price substantially below current market value. Similar price savings can be passed along to future occupants if proper legal mechanisms are instituted at the outset of the program.

Consider the alternative. If no restrictions are placed upon resale of the house, nothing prevents the lucky first owners from simply reselling to anyone who can pay a high market price and pocketing the difference. In that event, the public programs devoted to creating the housing give a windfall profit to a select few, with only diffuse benefit (marginally greater supply) to the public at large. The same risk is possible if restrictions are binding on only the initial recipients of the housing but not on subsequent owners. Then the second and third owner could reap such a windfall. Preserving for long-term public benefit the initial low cost of the housing is increasingly considered a fair and essential part of responsible housing initiatives.

As pointed out earlier, obviously the more limiting the resale formula is on the amount of value that the present owner can take away from the property upon sale, the more affordable the housing unit will be to the next and subsequent residents. Perhaps not so obviously, the limited equity restrictions in a CLT ground lease work to reallocate value in the real estate between the individual homeowner and the broader-based CLT. To the extent the individual has contributed value — through actual cash towards the purchase, amortization, and improvements and upkeep, or often through "sweat equity" which is valued, the individual is entitled to a return of that value plus some degree of appreciation. However, to the extent the broader real estate market would now value that property still more, that excess in value or appreciation remains with the property, in effect held by the CLT as a landowner.

The CLT model therefore attempts to disconnect the typical rigid link between legal title to property and claims on value. In this way, the "bundle of sticks" metaphor can be extended to viewing property also as a "bundle of values."[24] Like the other discrete attributes of property, value can be carved up and reallocated to some degree independently of the more formal attributes of ownership and estates in property.[25]

Seen this way, the CLT bridges the traditional dichotomy between property (and its value) as either public or private. Both elements of societal organization have ties to and claims on the particular property in question. Experience will tell whether such a reordering of traditional relationships will enhance the best aspects of each.

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[24] I am grateful to Chuck Matthei, now of the Equity Trust, Inc., and former director of the Institute for Community Economics, for his creativity in articulating this phrase.

[25] Commercial real estate practitioners have known this at some level through such examples as the "percentage lease," in which a landlord receives rent based not just on a static market valuation of the space leased at the commencement of the lease term, but also on a percentage of the gross income from that space. Loosely put, the theory in both the CLT and commercial percentage lease cases is that changes in the value of the property possessed by the lessee over time are partly attributable to individual lessee contribution, and partly to broader changes that influence value. The commercial landlord, of course, lays claim to some of this increased value individually itself; the CLT seeks to hold such value changes for the benefit of a broader community and for future persons in need of low-cost housing.

Mississippi Law Journal

**Published by Students at the
University of Mississippi School
of Law**

VOLUME 61 **WINTER 1991** **NUMBER 3**

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1991 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

During 1991, the Mississippi Supreme Court rendered decisions in fifty-six administrative law cases. This review, however, will concentrate only on those decisions that significantly modified, expanded, or changed existing Mississippi law. Though the majority of the 1991 administrative law decisions fell into one of three categories (misconduct of attorneys and judges, Employment Security Commission, and Workers' Compensation Commission), the Mississippi Supreme Court also decided administrative law cases involving the City Civil Service Commission,[1] Department of Wildlife Conservation,[2] Public Service Commission,[3] Real Estate Commission,[4] Mississippi State Department of

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[1] Watson v. City of Pascagoula, 577 So. 2d 1234 (Miss. 1991) (where city promulgates regulation under MISS. CODE ANN. § 21-31-23 (1972), which provided 30 days for employee to request investigation following disciplinary action, upon which employee detrimentally relied, city is estopped from subsequently asserting regulation is unlawful under MISS. CODE ANN. § 21-31-23 (Supp. 1990), which provides requests for investigation be made within ten days following disciplinary action).

[2] Mississippi Dep't of Wildlife Conservation v. Browning, 578 So. 2d 667 (Miss. 1991) (any decision of administrative board or agency must be based on substantial evidence appearing in record).

[3] Rankin Util. Co. v. Mississippi Public Service Comm'n, 585 So. 2d 705 (Miss. 1991) (where Public Service Commission discovers new information which warrants change in utility's rates, Commission may change or modify previous rate structure since it has continuing jurisdiction over utility rates); Mississippi Public Service Comm'n v. Mississippi Power & Light Co., No. 89-CC-1123 (Miss. Dec. 31, 1991) (administrative

Health,[5] County School Board,[6] and the State Board of Pharmacy.[7] The discussion of these latter cases will be relegated to the footnotes for purposes of this review. Textual analysis will be devoted to decisions rendered in the following administrative law areas: misconduct of attorneys and judges,[8] County Board of Supervisors,[9] Employment Security Commission,[10] State Tax Commission,[11] and the Workers' Compensation Commission.[12]

I. MISCONDUCT OF ATTORNEYS AND JUDGES

The Mississippi Supreme Court decided three noteworthy cases involving complaints filed by the Mississippi Commission on Judicial

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agency may not promulgate rules and regulations which conflict with or are contrary to provisions of statute it is administering).

[4] Mississippi Real Estate Comm'n v. White, 586 So. 2d 805 (Miss. 1991) (when broker is charged with failing to account for or remit monies belonging to others pursuant to MISS. CODE ANN. § 73-35-21(f) (pre-1989 amendment) and with failing to return earnest money "immediately when the purchaser is rightfully entitled to same" pursuant to MISS. REAL ESTATE BROKERS R. 24, Real Estate Commission must determine whether broker returned money with reasonable promptness under surrounding circumstances before sanctioning broker).

[5] Mississippi State Dep't of Health v. Southwest Miss. Regional Medical Center, 580 So. 2d 1238 (Miss. 1991) (State Department of Health's use of patient origin reports to measure population criteria under 1986 State Health Plan is not "arbitrary and capricious" and therefore is permissible); City of Durant v. Humphreys County Memorial Hosp., 587 So. 2d 244 (Miss. 1991) (where Mississippi State Department of Health gives notice by publication to non-health care providers in district where certificate of need is submitted, notice requirement of MISS. CODE ANN. § 41-7-1971(1) (Supp. 1985) is satisfied).

[6] Dean v. Pringle, 592 So. 2d 49 (Miss. 1991) (when person becomes certified employee of school district pursuant to valid contract, dismissal of such person for any reason other than those set forth in MISS. CODE ANN. § 37-9-59 (Rev. 1990) is without proper statutory basis and is arbitrary and capricious, entitling terminated employee to reinstatement and back pay).

[7] Duckworth v. Mississippi State Bd. of Pharmacy, 583 So. 2d 200 (Miss. 1991) (failure to make findings of fact is not ground for reversal where circumstances clearly show that action otherwise proceeded on correct theory of law or where omission does not impede proper review; where agent's implication that attorney may not be necessary for hearing is found not to be coercive, there is no denial of procedural due process); Riddle v. Mississippi State Bd. of Pharmacy, 592 So. 2d 37 (Miss. 1991) (where disciplinary board's actions are based upon clear and convincing evidence, board's decision will not be overturned).

[8] *See infra* notes 13-78 and accompanying text.

[9] *See infra* notes 79-88 and accompanying text.

[10] *See infra* notes 89-113 and accompanying text.

[11] *See infra* notes 114-127 and accompanying text.

[12] *See infra* notes 128-157 and accompanying text.

Performance regarding alleged misconduct by justice court judges.[13] In the most recent decision, *Mississippi Comm'n on Judicial Performance v. Hopkins*,[14] a complaint was filed by the Commission against justice court judge James "Petey" Hopkins alleging "willful misconduct" and multiple violations of the Code of Judicial Conduct,[15] the Mississippi constitution and the Mississippi Code for "accepting gifts, gratuities and other rewards intended to influence his actions as a justice court judge."[16] The Commission further amended its complaint when Hopkins was sentenced after his pleading *nolo contendere* to a charge of malicious mischief in the local county circuit court.[17] Much of the evidence against Hopkins was obtained from an undercover operation conducted by the Mississippi Department of Public Safety.[18] Undercover agents reported a variety of misconduct in the judge's course of dealing with a local bar which had been purchased by the Department of Public Safety for their undercover activities.[19] In response to the complaint filed by the Commission, a committee of three was formed to conduct a formal hearing which culminated in a recommendation that Hopkins receive a public reprimand.[20] While Hopkins argued that a private reprimand would be "more appropriate than a public reprimand if he had to be sanctioned,"[21] the Commission went further and set aside the decision of the committee and recommended that Hopkins be removed from office.[22]

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[13] *See generally* Mississippi Judicial Performance Comm'n v. A Justice Court Judge, 580 So. 2d 1259 (Miss. 1991) (denying Commission's recommendation to publicly reprimand a justice court judge for ticket fixing and other misconduct where mitigating circumstances would make the public humilation counterproductive); *In re Seal*, 585 So. 2d 741 (Miss. 1991) (affirmed decision of Commission to issue public reprimand to justice court judge for ticket fixing, allowing clerical personnel to adjuducate traffic violators "not guilty," and other willful and persistent failure to perform duties of office); Mississippi Judicial Performance Comm'n v. Hopkins, 590 So. 2d 857 (Miss. 1991) (ordered disbarment of justice court judge for soliciting favors, ticket fixing and other misconduct bringing judicial office into disrepute) (treated textually).

[14] 590 So. 2d 857 (Miss. 1991).

[15] *Hopkins*, 590 So. 2d at 857. The Commission on Judicial Performance charged Hopkins with the violation of Canons 1, 2A, 2B, 3A(1), and 3A(4) of the Code of Judicial Conduct. *Hopkins*, 590 So. 2d at 857-59.

[16] *Id.* at 857. The Commission found such conduct in violation of the Mississippi Code since Hopkins had "us[ed] his official position to obtain pecuniary benefit for himself." *Id.* at 857 (citing MISS. CODE ANN. § 25-4-105(1) (West Supp. 1990)).

[17] *Hopkins*, 590 So. 2d at 858.

[18] *Id.* at 858-61. The Mississippi Department of Public Safety had purchased a bar known as "The Hut" in an effort to discover criminal activities including gambling, automobile theft, drug sales and evidence of political corruption. *Id.* at 858.

[19] *Id.* at 858-61. Among the facts set forth in the record was an incident involving Judge Hopkins request of the undercover bar owner that he "would like to have free drinks and free admission." *Id.* at 859. Although Hopkins was never seen gambling in the bar, an undercover agent reported seeing Hopkins assist in the unloading of gambling machines upon delivery in a shipment consisting of both gambling machines and pool tables. *Id.* at 859-60.

The Mississippi Supreme Court affirmed the decision of the Commission,[23] finding that Hopkin's misconduct brought the "judicial office into disrepute,"[24] and that since Hopkins had been a justice court judge for nineteen years, he should have by such time acquired the requisite demeanor befitting the office.[25] The supreme court found further that Hopkins had committed "ticket fixing" and numerous specific acts of misconduct,[26] such as permitting the dismissal of traffic tickets by justice court clerks and other officials without proper adjudication,[27] failing to sign the court docket,[28] showing partiality by aligning himself with the prosecution,[29] and making derogatory comments about a Bureau of Narcotics official to a local newspaper.[30] The court observed that because of the great number of offenses involved coupled with Hopkin's stubborn denial of any wrongdoing, Hopkin's removal from office was necessary to preserve the dignity of the judicial office.[31]

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[20] *Id.* at 858.

[21] *Id.*

[22] *Hopkins*, 590 So. 2d at 858. The Commission made its recommendation based on its own Findings of Fact, and although the Commission had filed some objections to the findings submitted by the panel, it found violations of Canons 1 and 2A (ticket fixing, malicious mischief, slanderous remarks), 3A(1) and 3A(4) (ticket fixing, allowing dismissal of citations by clerks without judicial review, dismissal of criminal charges in exchange for aiding prosecution), 3B(1) and 3B(2) (not signing dockets, allowing clerks to perform judicial function), and section 177A of the Mississippi constitution. *Hopkins*, 590 So. 2d at 858.

[23] *Id.* at 866.

[24] *Id.*

[25] *Hopkins*, 590 So. 2d at 866.

[26] *Id.* at 864.

[27] *Id.* at 864 (citing Mississippi Judicial Performance Comm'n v. Cowart, 566 So. 2d 1251 (Miss. 1990)).

[28] *Id.* The court warned that such conduct was in violation of statutory duty. *Id.* (citing MISS. CODE ANN. § 9-11-11 (West Supp. 1990) and § 9-11-13 (1972) (requiring judge to sign docket upon disposition of case)).

[29] *Hopkins*, 590 So. 2d at 864-65. Judge Hopkins himself testified that:

> [I]t is not uncommon to take tickets under advisement on these joint owners, people that run the joint. We use them constantly to help us find people we're looking for, to help us find stolen cars, dope or whatever, and we do trade our tickets for information . . . [I]t is not unusual at all to dismiss felonies or anything else in order to get somebody at their [the Bureau of Narcotics'] request.

Id. at 864-65. The court found that by allying himself with the prosecution, Hopkins was no longer an impartial judge. *Id.* at 865 (citing Jenkins v. State, 570 So. 2d 1191, 1193 (Miss. 1990)).

[30] *Hopkins*, 590 So. 2d at 865-66 (citing In Re Bailey, 541 So. 2d 1036, 1040 (Miss. 1989)).

In *Board of Bar Admissions v. Applicant F*,[32] an applicant designated as "Applicant F" had scored 68, two points less than the minimum passing score of 70, which entitled the applicant to an automatic regrade of the examination.[33] After being subjected to the Board's liberal regrade policy,[34] Applicant F still fell short by less than one point with a score of 69.3.[35] Applicant F claimed that the examiners failed to provide adequate instructions to questions that were themselves misleading and poorly drafted,[36] and the applicant also attacked the grading in three of the examination areas as arbitrary and capricious.[37] The chancellor agreed, but the Mississippi Supreme Court reversed,[38] holding that the Board's decision was not fairly characterized as arbitrary, capricious or malicious.[39] The court noted that on regrade, Applicant F had not passed, even though he had benefitted substantially from the Board's liberal regrading policy which allowed the applicants to retain the higher grade previously attained in sections that receive lower scores from the regrading process.[40] The court found further that although the questions were in fact well drafted and supplied with adequate instructions,[41] Applicant F made material errors and omissions on the examination sections indicated.[42]

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[31] *Hopkins*, 590 So. 2d at 866.

[32] 582 So. 2d 377 (Miss. 1991).

[33] *Applicant F*, 582 So. 2d at 378.

[34] *Id.* at 380-81. Applicant F did considerably worse in one examination section during the regrade procedure, scoring 21 points lower. *Id.* at 381. Because of the regrade policy, Applicant F was able to retain the higher score achieved in the initial grading. *Id.* at 380-81.

[35] *Id.* at 381.

[36] *Id.* at 382.

[37] *Id.* at 377, 382-83.

[38] *Applicant F*, 582 So. 2d at 378-79. The Mississippi Supreme Court emphasized that vested with full authority bestowed by Mississippi's constitution, the court could sit as a finder of fact and review *de novo* matters pertaining to "discipline and disbarment " of lawyers as well as matters on review from decisions in chancery. *Id.* at 378-79 (citing Miss. Const., Art. 6, § 144 (1890) (establishing the Mississippi Supreme Court as state's highest court with inherent power to regulate officers of state courts); Mississippi State Bar v. Phillips, 385 So. 2d 943, 944 (Miss. 1980); Matter of Mississippi State Bar, 361 So. 2d 503, 505 (Miss. 1978)).

[39] *Applicant F*, 582 So. 2d at 384. The court cited Rule XII, § 2, RULES GOVERNING ADMISSION TO THE MISSISSIPPI STATE BAR (1979) as requiring that "the Chancery Court shall not regrade the examination or substitute its judgment of the merits of the applicant's examination for the decision of the Board." *Applicant F*, 582 So. 2d at 379. The court reasoned further that the chancery court may only reverse the decision of the Board if it is "arbitrary, capricious or malicious," which is the "familiar standard used in judicial review of other administrative licensing decisions in this state." *Applicant F*, 582 So. 2d at 379 (citing Melody Manor Convalescent Ctr. v. Mississippi State Dep't of Health, 546 So. 2d 972, 974 (Miss. 1989); Mainstream Sav. & Loan Ass'n v. Washington Fed. Sav. & Loan Ass'n, 325 So. 2d 902, 903 (Miss. 1976)). The court discussed further how Appellant F's attack on the grading process was in essence an attack on the "subjectivity of the grading process." *Applicant F*, 582 So. 2d at 383. Refuting such an attack, the court cited a Fifth Circuit case that essentially up-

In *Mississippi State Bar v. Attorney Y*,[43] the court held that Attorney Y's conduct violated the Code of Professional Responsibility of the Mississippi State Bar[44] when he neglected[45] to perform his legal obligation to his minor client.[46] Attorney Y disbursed monetary damages to the minor's mother who had not been approved by the court as the minor's legal guardian,[47] and had not otherwise taken steps to establish a guardianship for the minor.[48]

The Mississippi Supreme Court addressed several cases dealing with ethical violations involving various shades of dishonesty or behav-

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held a regrading procedure similar to the one used in Mississippi. *Id.* at 383-84 (citing Tyler v. Vickery, 517 F. 2d 1089, 1102-03 (5th Cir. 1975)). The supreme court explained that rather than require the courts to regrade essay examinations, the Supreme Court has appointed special examiners to perform the task. *Applicant F*, 582 So. 2d at 384. Thus, to undertake to regrade an examination would be an usurpation of the duties of those duly appointed to perform the task. *Id.*

[40] *Applicant F*, 582 So. 2d at 380.

[41] *Id.* at 380-82. The court noted that the general instructions were adequate. *Id.* Applicant F basically ignored the instructions to his detriment. *Id.* at 382.

[42] *Id.* at 382-83.

[43] 585 So. 2d 768 (Miss. 1991).

[44] *Attorney Y*, 585 So. 2d at 772-73. The court maintained that when Attorney Y engaged in conduct prejudicial to the administration of justice, he violated Disciplinary Rule
1-102(a)(5-6) of the Code of Professional Responsibility. *Id.* at 773.

[45] *Attorney Y*, 585 So. 2d at 772-73. The court emphasized that Attorney Y's conduct rose to a level to requiring discipline pursuant to the disciplinary rules of the Code of Professional Responsibility, and that such strictures were in harmony with previous decisions demanding "special care and solicitude" toward minors. *Id.* at 772 (citing Union Chevrolet Co. v. Arrington, 162 Miss. 816, 826, 138 So. 2d 593, 595 (1932); Mississippi State Bar v. Moyo, 525 So. 2d 1289 (Miss. 1988)).

[46] *Attorney Y*, 585 So. 2d at 773. Furthermore, when Attorney Y failed to procure the legal guardianship for the minor child for the proper safeguarding of the child's funds, he violated Disciplinary Rule 6-101(a)(2-3) of the Code of Professional Responsibility. *Id.* at 772-73 (citing MISS. CODE ANN. §§ 73-3-35, 93-13-17, -11, -35, -59, -67, -77 (1972); Union Chevrolet Co. v. Arrington, 162 Miss. 816, 826, 138 So. 2d 593, 595 (1932); Mississippi State Bar v. Moyo, 525 So. 2d 1289 (Miss. 1988)).

[47] *Attorney Y*, 585 So. 2d at 769-70. The mother reportedly gave assurances to Attorney Y that she would hire another attorney to set up a guardianship. *Id.* at 770.

[48] *Id.* at 769-71.

ior rendering an attorney unfit to practice law.[49] In *Mississippi State Bar v. Smith*,[50] an attorney, Smith, circumvented a court order[51] in an attempt to disburse monies to his clients who were anxious to proceeds of a wrongful death claim.[52] Smith claimed that in an effort to appease his clients,[53] he filed a false acknowledgment with the court which was fabricated to prove that the funds had been deposited in the bank in accordance with the court order.[54] The Mississippi Supreme Court found Smith's conduct was grossly at odds with those standards of integrity that are traditionally "one of the hallmarks of an attorney"[55] and ordered that Smith be suspended from the practice of law.[56]

In *Attorney Q v. Mississippi State Bar*,[57] the Mississippi State Bar responded with a formal complaint, alleging that Attorney Q violated the Code of Professional Responsibility when he advised the unrepresented party.[58] The complaint tribunal ordered a private reprimand.[59] The Mississippi Supreme Court affirmed,[60] holding that since the Mississippi Rules of Professional Conduct taken together with the comments[61] continued to prohibit the rendering of advise to unrepresented parties,[62] then Attorney Q had offended the pertinent rule in whatever form it might be articulated.[63] Addressing the words used by Attorney Q in communicating to the unrepresented adverse party,[64] the Mississippi Supreme Court proclaimed that rather than focus on what Attorney Q intended, the real test would be based on what a reasonable defendant "may reasonably have heard and understood."[65]

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[49] *See generally*, Watkins v. Mississippi State Bar, 589 So. 2d 660 (Miss. 1991) (consolidated decision: reversing tribunal's decision to suspend attorney for borrowing at usurious rates from lay person while ordering disbarment of attorney for conviction of felonies in separate incident); Culpepper v. Mississippi State Bar, 588 So. 2d 413 (Miss. 1991) (ordering disbarment for attorney's patterns of deception toward client and court including making settlement offers materially different from terms agreed to by client); Reid v. Mississippi State Bar, 586 So. 2d 786 (Miss. 1991) (ordering disbarment where attorney converted clients' money in his trust account for his own personal use); Mississippi State Bar v. Attorney D, 579 So. 2d 559 (Miss. 1991) (ordering private reprimand for penitent attorney who misrepresented that he had filed a lawsuit on behalf of client) Tucker v. Mississippi State Bar, 577 So. 2d 844 (Miss. 1991) (affirming tribunal's order disbarring law firm associate for secretly charging clients excessive fees then depositing the proceeds into his personal account for his personal use).

[50] 577 So. 2d 1249 (Miss. 1991).

[51] *Smith*, 577 So. 2d at 1250. The terms of the decree provided that the money be deposited in an interest bearing account in a designated bank by a specified date. *Id.* The bank was required to have a certified copy of the decree, and an officer of the bank acknowledge the receipt thereof. *Id.*

[52] *Id.* The chancellor approved the administratrix' request to settle the wrongful death claim for $80,300. *Id.*

[53] *Id.* at 1251.

[54] *Id.* Smith downplayed his falsification of the acknowledgment by noting that he had used the name of "C. Dennon Brannon" rather than the name of the bank's vice president, "C. Dennon Barron." *Id.*

[55] *Id.* at 1252 (citing Brumfield v. Mississippi State Bar Ass'n, 497 So. 2d 800 (Miss. 1986)).

[56] *Smith*, 577 So. 2d 1252-53. The court relied in part on Rule 8 and 12 of the Rules of Discipline for the Mississippi State Bar, which provide for suspensions with probation for fixed periods of time and for the monitoring of suspended attorneys with probation. *Id.*

[57] 587 So. 2d 228 (Miss. 1991).

[58] *Attorney Q*, 587 So. 2d at 231. The Mississippi State Bar again alleged in its

In *Attorney BT v. Mississippi Bar*,[66] the complaint tribunal suspended Attorney BT for failing to file an appeal brief for a client accused of capital murder and convicted of non-capital murder with a life sentence.[67] Attorney BT had previously been fined by the Mississippi Supreme Court for contempt of court because of such failure to file the brief after the court had twice granted him additional time to do so.[68] The Mississippi Supreme Court affirmed the complaint tribu-

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formal complaint that Attorney Q's violated DR7-104(A)(2) of the Code of Professional Responsibility (1983). *Attorney Q*, 587 So. 2d at 231.

[59] *Attorney Q*, 587 So. 2d at 231.

[60] *Id.* at 232-34. The court concluded that "we perceive no change of substance in the current rules," and noted that Canon 9 of the American Bar Association's Canons of Professional Ethics proscribed any attempt to advise or mislead unrepresented parties. *Id.* at 232. The court observed that Canon 9 of the ABA Canons of Professional Ethics was replaced substantially by DR7-104 and EC7-18 of the Code of Professional Responsibility which rendered the same effect as its predecessor. *Id.* (citing American Bar Association Informal Opinion No. 1140 (adopted January 20, 1970)).

[61] *Attorney Q*, 587 So. 2d at 232. Attorney Q argued for leniency based on language in Rule 4.3 of the Mississippi Rules of Professional Conduct that requires that where a lawyer implies that he is disinterested or where the lawyer is dealing with someone he reasonably should know is unrepresented, the lawyer "shall make reasonable efforts to correct the misunderstanding." *Id.*

[62] *Id.* at 232-33. The court declared that the Comment to Rule 4.3 of the Mississippi Rules of Professional Conduct, adopted in July 1, 1987, clearly proscribe with equal vigilance the misconduct attributed to Attorney Q. *Attorney Q*, 587 So. 2d at 232-33. The Comment directs that "the lawyer should not give advise to an unrepresented person other than the advise to obtain counsel." *Id.* at 233.

[63] *Attorney Q*, 587 So. 2d at 233. The court reasoned that even though the more specific proscription against advising unrepresented parties as set forth in the Mississippi Rules of Professional Conduct is "relegated to the Comment" to Rule 4.3, the effect is the same since the Comments to the Rules are "guides to interpretation." *Id.*

[64] *Id.*

[65] *Id.* The court rejected Attorney Q's argument that focused on his mind-state, since in essence the Rule is designed to protect the unrepresented person. *Id.*

[66] 589 So. 2d 119 (Miss. 1991).

[67] *Attorney BT*, 589 So. 2d at 120.

[68] *Id.*

nal's finding for imposing discipline,[69] but reversed the order for a sixty-day suspension. The court ordered a private reprimand, holding that the suspension was "unduly harsh and severe" in light of the previously imposed sanction for contempt and considered together with the delay in excess of six years from the time of the misconduct until the filing of the complaint.[70] The court dismissed Attorney BT's argument that the Mississippi Bar was collaterally estopped and barred by *res judicata* of any attempt to readdress the misconduct.[71] The court further held that when the supreme court found Attorney BT guilty of contempt of court six years earlier, "it was not exercising its disciplinary jurisdiction, as that is delegated to the disciplinary agencies, but was exercising inherent authority to enforce its rule making power."[72] The court also declared that while the disciplinary agencies of the supreme court did not exist separately and independently from the supreme court,[73] "the function that is delegated to them is separate and independent from the court's primary function as the State's highest appeals court."[74]

Additionally, the Mississippi Supreme Court addressed other diverse issues related to the legal profession, including judicial standards for recusal,[75] the authority of a trial court to levy fines on attorneys arriving late to scheduled trials,[76] the propriety of awarding attorney's fees *ex parte*,[77] and standards and procedures for imposing reciprocal discipline.[78]

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[69] *Id.* at 121-22.

[70] *Id.* In modifying the sanction by the tribunal, the court held that "[t]he prior sanction and this private reprimand is adequate to provide discipline for this violation." *Id.*

[71] *Id.*

[72] *Attorney BT*, 589 So. 2d at 122. The court reasoned that while the court had exclusive jurisdiction over disciplinary matters pursuant to MISS. CODE ANN. § 73-3-301, *et seq.* (1972), Rule 3 of the Rules of Discipline provided for five agencies that would assist the court in performing this function. *Attorney BT*, 589 So. 2d at 122. The complaint tribunal had found multiple violations of the Code of Professional Responsibility where Attorney BT violated DR6-101(A)(3) when he "neglected a legal matter entrusted to him," and DR7-101(A)(3) when "he intentionally prejudiced or damaged the client during the course of their relationship." *Attorney BT*, 589 So. 2d at 122. The court declared that by enforcing disciplinary rules against Attorney BT through one of its agencies, it was not at all precluded from enforcing other procedural rules necessary to maintain order during proceedings before the supreme court. *Id.* at 122 (citing Rule 1(b) of the Rules of Discipline).

[73] *Attorney BT*, 589 So. 2d at 121-22.

[74] *Id.*

[75] Buchanan v. Buchanan, 587 So. 2d 892 (Miss. 1991) (reversed and remanded decision of chancellor denying party's request for recusal where aggrieved party had colorable claim sufficient to create reasonable doubt of chancellor's impartiality).

[76] Oliver v. State, 576 So. 2d 1256 (Miss. 1991) (affirmed fine and costs afixed by circuit court to limit allowed by Uniform Rules of Circuit Court Practice where attorney

II. County Board of Supervisors

In *McIntosh v. Amacker*,[79] the court addressed the requirements to invoke the jurisdiction of a circuit court when appealing an order of a County Board of Supervisors. A landowner attempted to perfect an appeal from an order of the Pearl River County Board of Supervisors (Board).[80] The landowner mailed notice of appeal to the Board Clerk and requested that the Board proceedings be transcribed for submission to the Circuit Court of Pearl River County (circuit court).[81] However, no bill of exceptions was obtained and filed with the circuit court.[82] Thereafter, the landowner filed a motion requesting the circuit court to consider errors of law prior to a jury trial on damages.[83] The circuit court denied the motion[84] and proceeded to trial solely on the issue of damages.[85] The Mississippi Supreme Court held that absent a bill of exceptions the circuit court is not vested with subject matter jurisdiction over appeals from the Board of Supervisors.[86] The court

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arrived 35 minutes late to represent criminal defendant).

[77] Griffin v. Griffin, 579 So. 2d 1266 (Miss. 1991) (remanding chancellor's *ex parte* award of $4450.00 in attorney's fees after close of proceedings in conjunction with motion for contempt of court).

[78] *See generally* Mississippi State Bar v. Attorney FS, No. 91-BA-0016 (Miss. Oct. 16, 1991) (certified copy of foreign judgment ordering sanctions against member of bar constituting conclusive evidence of guilt; complaint tribunal to determine extent of reciprocal discipline which may be more or less severe than that ordered in foreign jurisdiction).

[79] 592 So. 2d 525 (Miss. 1991).

[80] *McIntosh*, 592 So. 2d at 526. The Pearl River County Board of Supervisors (Board) granted a private right-of-way easement by necessity across the land of Mr. and Mrs. David R. McIntosh. *Id.* The Board assessed damages in the sum of $3,000 per acre, with $2,000 minimum to be paid to the McIntoshes by the landowners who received the easement. *Id.*

[81] *Id.*

[82] Miss. Code Ann. § 11-51-75 (1972). The section requires a bill of exceptions to appeal from an order of the Board of Supervisors. *Id.*

[83] *McIntosh*, 592 So. 2d at 526.

[84] *Id.* The circuit court denied the motion and held that "pursuant to Evans v. Sharkey County, 89 Miss. 302, 307, 42 So. 173 (1906), a bill of exceptions must be filed to preserve questions of law." *McIntosh*, 592 So. 2d at 526. Therefore, the circuit court limited the appeal to questions of fact regarding damages. *Id.*

[85] *Id.* The jury assessed damages in the amount of $387.00. *Id.*

[86] *Id.* at 527.

also expressly overruled *Evans v. Sharkey County*[87] to the extent it held no bill of exceptions is required where an appeal from an order of the Board of Supervisors is solely for a jury's assessment of damages.[88]

III. Employment Security Commission

The supreme court decided nine cases involving the Mississippi Employment Security Commission. One of the more unique questions the court resolved in 1991 in this area arose in *Mississippi Employment Security Commission v. Gaines.*[89] In *Gaines*, the court faced the question of whether voluntary retirement, of a person still available for suitable work, disqualifies that person from unemployment benefits when the retirement is induced by the fact that the retirement benefits exceed job earnings.[90] The Commission affirmed the decision of the claims examiner disqualifying the claimant from receiving unemployment compensation benefits on the basis that she left work voluntarily without good cause.[91] On appeal from the circuit court's reversal, the

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[87] 89 Miss. 302, 42 So. 173 (1906).

[88] *McIntosh*, 592 So. 2d at 527-28. The court noted the general statute (Miss. Code Ann. § 11-51-75 (1972)) governing appeals to the circuit court from boards of supervisors required the filing of a bill of exceptions to invoke circuit court jurisdiction. *Id.* at 527. The court further noted the statute (Miss. Code Ann § 65-7-67 (1972)) which governs appeals from the board of supervisors' actions pursuant to a petition for a right-of-way easement does not require a bill of exception. *McIntosh*, 592 So. 2d at 527. The court also noted the *Evans* decision involved construction of section 3896 (1892), the antecedent to Miss. Code Ann. § 65-7-67 (1972). *McIntosh*, 592 So. 2d at 527. However, the court stated procedural uniformity necessitates a rule requiring a bill of exceptions to invoke the subject matter jurisdiction of the circuit court "in all appeals from boards of supervisors, regardless of the issues presented." *Id.*

[89] 580 So. 2d 1230 (1991).

[90] *Gaines*, 580 So. 2d at 1231. The claimant, Annell Gaines, was a part-time postal clerk for the United States Postal Service in Decatur, Mississippi. *Id.* Serving in that capacity for nearly 24 years, Gaines was required to work flexible hours as assigned in supplementing the regular work force. *Id.* at 1232. For the five year period immediately preceding her retirement, Gaines asserted that she averaged two to four hours of work per week. *Id.* Upon reaching 60 years of age, the local Postmaster advised Gaines that she was eligible to retire and "commented" that she could receive more money through retirement benefits than in wages. *Id.* Gaines also alleged that she had been informed of the possibility that her hours were going to be cut. *Id.* Gaines ultimately did retire and sought unemployment compensation benefits. *Id.* at 1231.

[91] *Id.* The Circuit Court of Newton County reversed the Commission's decision holding that the appeals referee had improperly applied the law to his factual findings. *Id.* at 1232. The circuit court relied upon Tate v. Mississippi Employment Sec. Com'n, 407 So. 2d 109 (Miss. 1981), which held that an employee may be eligible for benefits "where an employee's hours have been drastically reduced to a point that there is no continued employment in any real sense." *Gaines*, 580 So. 2d at 1233.

Mississippi Supreme Court reversed, holding that the availability of retirement benefits in excess of salary is not "good cause" justifying voluntary relinquishment of employment within the meaning of Section 71-5-513 of the Mississippi Code.[92] While recognizing that an employee's election to retire will not always preclude benefits eligibility, the supreme court declared that unemployment compensation benefits were not designed to assist claimants who voluntarily retire from employment for no other reason than to obtain an increase in income.[93]

Though in a different context, the supreme court also considered the unemployment benefits issue in *Mississippi Employment Security Commission v. Bell*.[94] The court in *Bell* addressed employee misconduct, a common reason for disqualification for unemployment compensation benefits, in a novel factual setting.[95] The Commission denied the claimant benefits on the basis that her excessive absenteeism rose to the level of "misconduct" justifying disqualification under section 71-5-513(A)(1)(b) of the Mississippi Code.[96] The Mississippi Supreme Court affirmed the circuit court's reversal and associated grant of benefits.[97]

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[92] *Id.* at 1233-34. The court noted that under MISS. CODE ANN. § 71-5-513 (1972), an employee may be disqualified from receiving unemployment compensation benefits for leaving work "voluntarily without good cause." *Gaines*, 580 So. 2d at 1233. Citing Shannon Engineering Construction, Inc. v. Employment Security Comm'n, 549 So. 2d 446 (Miss. 1989), the court stated that Mississippi places the burden of proof to show employee disqualification on the employer, which the employer must satisfy by "substantial, clear and convincing, evidence." *Gaines*, 580 So. 2d at 1233.

[93] *Id.* at 1233-34. The court distinguished *Tate* by reasoning that in *Tate* circumstances were such as to make it no longer economically feasible to work, whereas there had been no apparent change in Gaines' employment status or earnings. *Id.*

[94] 584 So. 2d 1270 (Miss. 1991).

[95] *Bell*, 584 So. 2d at 1271. The claimant, Bettie G. Bell, was an employee of 13 years for Frito Lay. *Id.* at 1272. Prior to her employer's initiating a change in her work schedule, Bell had a good employee record. *Id.* at 1274. Because of the revised schedule, Bell experienced difficulty in picking her children up from school. *Id.* at 1272. Bell sought to alleviate the conflict between her employment and domestic obligations by requesting a change in her lunch schedule which would permit her to pick her children up without having to be absent from work. *Id.* at 1272. Her supervisor, however, denied her request and continued to enforce strictly the absenteeism policy even counting days on which Bell was absent with a doctor's excuse. *Id.* at 1272-73.

[96] *Id.* at 1271. Notwithstanding the recognition of Bell's situation, the Commission affirmed the claims examiner's determination that Bell was guilty of misconduct as that term had been construed in Mississippi Employment Security law. *Id.*

[97] *Id.* The Circuit Court of Hinds County reversed the Review Board's decision denying Bell unemployment compensation and stated that the Board's decision was not supported by substantial, clear and convincing evidence. *Id.* at 1271-72. The circuit court declared that no wilfulness could be reasonably inferred when " 'a long term employee experienced difficulty over a relatively short period because of a domestic situation and

Noting the definition of misconduct as it had recently been construed,[98] and citing persuasive authority,[99] the supreme court expanded the definition of misconduct by holding that a claimant's good faith effort to alleviate employment problems negates any alleged wilful and wanton disregard of the employer's interest.[100]

Other cases in which the court decided whether employees' actions fell within the definition of misconduct justifying disqualification for employment compensation included allegations of misconduct for deliberate violations of company policy,[101] excessive absenteeism,[102] and fighting at the workplace.[103]

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other mishaps.' " *Id.* at 1272.

[98] *Id.* at 1273. The supreme court cited Mississippi Employment Sec. Comm'n v. Martin, 568 So. 2d 725, 727 (Miss. 1990), wherein the court explained the definition of misconduct within the meaning of MISS. CODE ANN. § 71-5-513 as being "conduct evincing such willful and wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect from his employees." *Bell*, 584 So. 2d at 1273.

[99] *Id.* at 1273-74. To support its reasoning, the court cited McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. Ct. App. 1991). *Bell*, 584 So. 2d at 1273. *McCourtney* involved the termination of an employee with 10 ½ years experience who had no attendance problems until the birth of her child. *McCourtney*, 465 N.W.2d at 723. When her child became ill, however, McCourtney had frequent absences for a five month period, which ultimately resulted in her termination for excessive absenteeism. *Id.* The Minnesota Court of Appeals reversed the Commission's denial of benefits, reasoning that McCourtney had demonstrated a good faith effort to comply with her work schedule and further that "her inability to find care for her child [was] not 'misconduct'." *Id.* at 724-25. Rather, as the Minnesota court stated, her "actions were motivated by a willful regard for her child's interests and not a wanton disregard of her employe's interest or lack of concern for her job." *Id.*

[100] *Bell*, 584 So. 2d at 1274. The Mississippi Supreme Court, therefore, proclaimed that the denial of unemployment compensation benefits to Bell, "a victim of circumstances," was inappropriate. *Id.*

[101] Mississippi Employment Sec. Comm'n v. Flanagan, 585 So. 2d 783 (Miss. 1991) (where employee knows that certain actions are violative of employer's policy and has been counseled on previous violations of that policy, employee's continued violations constitute "misconduct" sufficient to disqualify her from unemployment compensation benefits pursuant to MISS. CODE ANN. § 71-5-513A(1)(b) (Supp. 1990)); Mississippi Employment Sec. Comm'n v. Lee, 580 So. 2d 1227 (Miss. 1991) (taking unauthorized firearm to work in violation of company policy was deliberate act constituting "misconduct" sufficient to disqualify terminated employee from receiving unemployment benefits).

[102] Barnett v. Mississippi Employment Sec. Comm'n, 583 So. 2d 193 (Miss. 1991) (employee's continued unexcused absences, in light of record of excessive absenteeism and admonishment for same, constituted misconduct justifying disqualification from unemployment benefits).

[103] Mississippi Employment Sec. Comm'n v. McLane-Southern, Inc., 583 So. 2d 626 (Miss. 1991) (employee's involvement in isolated fight in self-defense at workplace does not in and of itself constitute misconduct within meaning of statute's disqualification).

In *Booth v. Mississippi Employment Security Commission*,[104] the Mississippi Supreme Court considered the constitutionality of the Commission's notice of appeal regulations.[105] *Booth* presented the question of whether absence of notice to an attorney representing a claimant in an administrative proceeding, affecting substantial rights of the claimant, constitutes a denial of due process when the claimant himself was given notice.[106] On appeal from the circuit court's decision affirming the Commission's ultimate denial of benefits,[107] the supreme court affirmed the denial of unemployment compensation benefits.[108] The court, while agreeing that unemployment benefits are constitutionally protected property rights,[109] stated that procedure in unemployment compensation cases is governed by regulations prescribed by the Commission[110] and that in *Booth* those regulations satisfied minimum due process requirements.[111] Thus, the supreme court held that there is no constitutional right to have notice sent to a claimant's attorney "as long as notice to the claimant is 'reasonably calculated' to apprise the claimant of necessary information."[112]

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[104] 588 So. 2d 422 (Miss. 1991).

[105] *Booth*, 588 So. 2d at 423. The claimant, Edward L. Booth, was fired for several reasons including excessive absenteeism. *Id.* at 425. Booth then sought unemployment compensation benefits. *Id.* at 424. After the referee reversed the claims examiner's decision denying Booth benefits, Booth's employer, the City of Pascagoula, filed a notice of appeal to the Board of Review. *Id.* The Chairperson of the Board notified Booth of the City's appeal via a copy of the letter from the Board acknowledging receipt of the City's request for the appeal. *Id.* at 426. The Board, however, did not forward a copy of the letter to Booth's attorney of record who had represented him before the referee. *Id.*

[106] *Id.* at 423-24. Booth conceded that he received a notice of the City's appeal but asserted that his constitutional rights to due process were violated because his attorney did not receive the same notification. *Id.* at 426. Specifically, Booth contended that unemployment benefits rise to the level of property rights protected by the due process clause and, for that reason, mere notice to him was insufficient to satisfy his minimum due process rights. *Id.* Booth supported his argument by noting that Board regulations entitled him to counsel. *Id.*

[107] *Id.* at 424. The Board reversed the referee's decision and denied Booth's claim, after which Booth appealed to the Jackson County Circuit Court. *Id.* The circuit court affirmed, holding the Board's denial to be supported by substantial evidence in light of applicable law. *Id.*

[108] *Id.* at 428. The court gave the constitutional question extensive analysis, citing both persuasive case law and constitutional authority. *Id.* at 426-28.

[109] *Id.* at 428. The court cited Perry v. Department of Employment Training, 523 A.2d 1242, 1243 (Vt. 1987), for this proposition. *Booth*, 588 So. 2d at 428.

[110] *Booth*, 588 So. 2d at 427. Mississippi Employment Security Commission procedure is governed by its own regulations, such authority being granted by MISS. CODE ANN. § 71-5-525 (1972).

[111] *Booth*, 588 So. 2d at 428. Concluding that due process requirements were satisfied without regard to Booth's claim, the court declared minimum due process requirements to be met "so long as such notice is 'reasonably calculated' to apprise the claimant of necessary information." *Id.* In so doing, the court relied in part upon Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), which held that:

The Mississippi Supreme Court also decided cases on the issue of employer liability for unemployment contributions.[113]

IV. Tax Commission

In *Mississippi State Tax Commission v. Vicksburg Terminal, Inc.*[114] the court had to decide whether a company engaged in "terminaling"[115] is subject to classification as a taxable public storage warehouse under Mississippi sales tax law.[116] Vicksburg Terminal, Inc.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. This notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Mullane, 33 U.S. at 314 (1950), *quoted in* Covington v. Covington, 459 So. 2d 780, 782 (Miss. 1984).

[112] *Booth*, 588 So. 2d at 428. Nevertheless, the court, citing Mountain States Telephone & Telegraph Co. v. Department of Labor & Employment, 520 P.2d 586, 589 (Colo. 1974), made a strong recommendation to the Commission "that it consider amending its procedural rules to require notice to both a claimant and the attorney of record since an argument could be made that '*[p]rocedural due process cannot be satisfied when counsel, upon whom a client is entitled to rely, is not notified of decisions affecting his client's interests.*' " *Booth*, So. 2d at 428, 427.

[113] Mississippi Employment Sec. Comm'n v. PDN, Inc., 586 So. 2d 838 (Miss. 1991) (where service provider meets its burden of proof that no employer-employee relationship exists between itself and its workers, such service provider falls outside statutory definition for "employer" rendering it free from liability for unemployment contributions under Mississippi Employment Security laws); Mississippi Employment Sec. Comm'n v. Total Care, Inc., 586 So. 2d 834 (Miss. 1991) (where services performed for another fall within common law principles governing master-servant relationships, work done for compensation constitutes "employment" under MISS. CODE ANN. § 71-5-11(1)(14) (Rev. 1989), thereby rendering employer liable for unemployment contributions).

[114] 592 So. 2d 959 (Miss. 1991).

[115] *Mississippi Tax Comm'n*, 592 So. 2d at 961. Terminaling involves the receipt, storage, and redelivery or withdrawal of liquid petroleum products. *Id.*

[116] MISS. CODE ANN. § 27-65-3 (1972) identifies miscellaneous businesses which are subject to sales tax. The section states in part:

> Upon every person engaging or continuing in any of the following businesses or activities there is hereby levied, assessed and shall be collected a tax equal to six percent (6%) of the gross income of the business except as otherwise provided:. . . Public storage warehouses; . . .

(Vicksburg) and Delta Terminal, Inc. (Delta) were engaged in commercial businesses referred to as terminaling.[117] They both facilitated the removal of liquid petroleum products from waterborne barges into land based storage facilities and subsequently transported those products from storage facilities into tanker trucks operated by "jobbers."[118] Vicksburg and Delta received custody of the products when it entered their hoses but title to the products never passed to them.[119] Customers did not receive any property interest in the tanks, in the real property surrounding the storage or in the facilities.[120] Neither Vicksburg nor Delta rented or leased all or any part of their property or facilities to customers under an exclusive storage contract.[121] Vicksburg and Delta are compensated on a per-barrel or per-gallon of product basis.[122] The Mississippi Supreme Court, distinguishing *Lambert v. Mississippi Limestone Corp.*,[123] held that Vicksburg and Delta were taxable entities as "public storage warehouses" within the meaning of Mississippi sales tax law. The court concluded that to qualify for "public" status,

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MISS. CODE ANN. § 27-65-23 (1972). Rule 67 of the Mississippi Sales and Use Tax Rules defines a storage warehouse as follows:

> Rule 67. Public Storage Warehouses.
>
> Storage Warehouses:
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> A storage warehouse is a place where tangible personal property is kept and stored for a fee in the custody of a person operating a commercial business. The gross income received from such an activity is taxable at the regular retail rate of sales tax.
>
> Rental of Storage Facilities:
>
> Income derived from the rental of real property for the purposes of storing tangible personal property wherein the lessee has control of the facilities and the property stored is not subject to tax. Example: mini storage facilities.

Miss. Sales and Use Tax Rule 67.

[117] *Mississippi Tax Comm'n*, 592 So. 2d at 861.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* at 862. Both Vicksburg and Delta had contracts with more than one customer. *Id.*

[122] *Id.* The contracts provided that compensation was for product delivered for unloading, storing, and reloading or for product *delivered* for all terminaling services. *Id.* The compensation was measured on a monthly basis by the barrels or gallons of product withdrawn from storage. *Id.*

[123] 405 So. 2d 131 (Miss. 1981). In *Lambert*, the Limestone Corporation, based on a written agreement, furnished to MisCoa a storage facility and certain handling services. *Id.* The court concluded Limestone did not operate as a public storage warehouse subject to state sales taxation because Limestone leased its facility exclusively to MisCoa, the storage fee was fixed and did not vary based upon the amount of personalty stored, and MisCoa could terminate the contract for third party storage. *Id.* at 132.

Vicksburg and Delta only had to be open and available to do business with as many customers as their storage capacity would allow.[124] The court also found Vicksburg and Delta's lack of advertisement and solicitation, the incidental functions of the storage business,[125] and fees based upon the amount of product withdrawn[126] did not affect the "public storage warehouse" status.[127]

V. Workers' Compensation Commission

The supreme court had an active year in the workers' compensation area. One expansive decision rendered by the court was *White v. Hattiesburg Cable Co.*[128] *White* allowed the court the opportunity to construe the compensability of medical expenses as provided by Section 71-3-15 of the Mississippi Code.[129] Specifically, the case involved the issue of whether chiropractic services are excluded from medical benefits, the cost of which the employer must absorb pursuant to statutory mandate.[130] Although the administrative law judge's (A.L.J.) decision that the employer was not liable for chiropractic services was affirmed by both the full Commission and the circuit court,[131] the Mississippi Supreme Court reversed, holding that the employee was entitled to compensation for the expenses she incurred during chiropractic treatment.[132] In concluding that chiropractic services are not excluded under the Mississippi Workers' Compensation Act, the court stated that to hold otherwise would overlook the broad humanitarian purpose of the Act to rehabilitate and restore the health and vocational opportunity of injured employees without financial or treatment limitations.[133] Therefore, the supreme court held that where treatment is both necessary and performed for a reasonable fee, an employee must be compensated for the expenses incurred in the treatment of the work-related injury, notwithstanding that treatment was given by a chiropractor as opposed to a traditional medical physician.[134]

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[124] *Miss. Tax Comm'n*, 592 So. 2d at 964-65.

[125] *Id.* at 11. Vicksburg and Delta argued against "public storage warehouse" status since storage was not their primary service. *Id.* at 10. Vicksburg and Delta contended its primary services were such things as (1) receiving the product, (2) docking barges, (3) inspecting the cargo, (4) pumping into storage, (5) delivering to trucks, and (6) accounting for the product. *Id.* at 10-11. However, the court found Vicksburg and Delta's primary service that of public storage warehousing and receiving, docking, inspecting and the like were incidental functions performed by most warehouses. *Id.* at 11.

[126] *Id.* at 12. The court stated the quantity of product taken out of storage is indicative of the quantity placed into storage and thus stored. *Id.*

[127] *Id.* at 10-12.

[128] 590 So. 2d 867 (1991).

[129] *White*, 590 So. 2d at 868-69. The claimant, Earnestine White, slipped and fell injuring her shoulder and lower back during the course of her employment with Hattiesburg Cable Company. *Id.* at 868.

[130] *Id.* at 869. White retained two general practitioners, an orthopedic surgeon, an orthopedist, and a chiropractor to provide medical services on her behalf. *Id.* at 868. The chiropractor provided services for White for approximately seven months; the bill for which was nearly $3,000. *Id.*

[131] *Id.* The A.L.J. allowed compensation for all medical benefits except the chiropractic service. *Id.* The A.L.J. based his decision on the conclusion that the statute did not authorize employer liability for services rendered by a chiropractor. *Id.*

[132] *Id.* at 868. Noting that a debate on the merits of chiropractic was pointless, the

Though in a different factual context, the Mississippi Supreme Court also addressed the issue of compensability in *Borden, Inc. v. Eskridge*.[135] The question presented in *Eskridge* was whether a mental disability unaccompanied by physical injury is compensable under the Workers' Compensation Act.[136] Agreeing with the A.L.J.'s decision, which was affirmed by both the Commission and the circuit court,[137]

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supreme court acknowledged that chiropractic is "a specialized field in the art of healing" recognized by statute, governed by a state board, and operated under mandate of a state license to practice. *Id.* at 869. Citing State Farm Mutual Auto Insurance Co. v. Gregg, 526 So. 2d 554, 557 (Miss. 1988), the court also stated that the term "medical" seemingly included " 'the practice of medicine *and other healing disciplines* dealing with the investigation, prevention, cure and alleviation of disease.' " *White*, 590 So. 2d at 868 (emphasis added).

[133] *White*, 590 So. 2d at 869. The court relied in part on V. DUNN, MISSISSIPPI WORKERS' COMPENSATION, § 340 (3d ed. 1982), in support of the decision to liberally construe the meaning of "medical services" as it is used in MISS. CODE ANN. § 71-3-15 (1972). *White*, 590 So. 2d at 869-70. The court, however, qualified its decision by stating that "[n]either the Act nor this decision authorizes workers' compensation medical benefits to charlatans or payment for services not needed." *Id.* at 870.

[134] *White*, 590 So. 2d at 870. Recognizing that the decision in *White* broadened the Commission's authority "to meet the significant purpose of the Act," the court also summarily indicated the denial of workers' compensation benefits for the sole reason of who in fact rendered medical services could violate the Fourteenth Amendment's equal protection clause. *Id.*

[135] No. 89-CC-0787 (Miss. Nov. 20, 1991).

[136] *Eskridge*, No. 89-CC-0787, slip op. at 1. Billy C. Eskridge, a long-time employee of Borden, Inc., alleged that the decline in his mental health was directly caused by his supervisor's negative attitude and associated actions toward him. *Id.* at 2-4. Eskridge's wife, who was also a Borden employee, testified that Eskridge's supervisor had made an unsolicited sexual advance towards her, which she rejected, in the year prior to her husband's first demotion. *Id.* at 2. Eskridge was subsequently demoted again, chastised in the presence of a company headquarters engineer, blatantly ignored professionally and socially, and subjected to rumors that he and his wife were to be fired — all by his supervisor. *Id.* at 2-3. Because of these events, Eskridge suffered nervousness, sleeplessness, depression, anxiousness, irritability, recurring nightmares, and blackouts. *Id.*

[137] *Id.* Although the A.L.J. found that the Borden supervisor's course of conduct aggravated a pre-existing condition, the Commission found no pre-existing mental disa-

the supreme court held that the facts, clearly accepted as true by the Commission, showed the employee's mental injury to be the result of a deliberate course of conduct by his supervisor.[138] Since the stresses to which the employee was subjected were " 'more than the ordinary incidents of employment'," the court reasoned that an award of workers' compensation benefits was equitable even though the mental disability was unaccompanied by physical injury.[139]

The supreme court decided similar issues of compensability in several other workers' compensation cases in 1991.[140]

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bility or personality disorder in Eskridge's psychological background. *Id.* at 6. Eskridge's psychiatrist treated Eskridge for two and one-half years, concluding that Eskridge "suffered from a major depression of psychotic proportions." *Id.* The psychiatrist also concluded that Eskridge was totally disabled from holding any type of management position and that his condition of employment was a "significant cause" of his mental disorder. *Id.* at 4.

[138] *Id.* In light of the standard for appellate review, the court stated that though evidence contrary to the Commission's findings existed, substantial credible evidence also existed that supported the award of benefits to Eskridge thereby precluding reversal. *Id.* at 6-7.

[139] *Id.* at 7. The supreme court distinguished Fought v. Stuart C. Irby Co., 523 So. 2d 314, 318 (Miss. 1988), wherein the court held that "[w]hen a worker seeks compensation benefits for disability resulting [solely] from a mental or psychological injury, he must not only prove a (1) disability that is (2) work-related, but also, (3) . . . [one that] must have been caused by *something more than the ordinary incidents of employment.*" *Eskridge*, No. 89-CC-0787, slip op. at 5. Moreover, the court noted that the ultimate result depends upon the Commission's finding of fact. *Id.* Thus, because the Commission found by clear and convincing evidence that Eskridge's mental injury was caused by a deliberate course of conduct by his employer and that nothing in his psychological history suggested a pre-existing personality disorder, unlike in *Fought*, the court determined the award to be justified. *Id.*

[140] Estate of Trest v. B.C. Rogers Processors, Inc., 592 So. 2d 110 (Miss. 1991) (where claimant's medical expert opines alternate theories of causation for claimant's work-related injury, expert's inability to identify exact cause of injury will not preclude award of benefits); Bechtel Corp. v. Phillips, 591 So. 2d 819 (Miss. 1992) (where employee claims to have sustained compensable work-related injury, employee must establish causation via expert medical evidence); Cawthon v. Alcan Aluminum Corp., No. 90-CC-0146 (Miss. Oct. 16, 1991) (assuming without deciding that Mississippi should recognize employer's defense of estoppel by fraudulent procurement of employment to claim for benefits, failure to show causal relationship between false representation and injury will prove fatal to defense); Georgia Pacific Corp. v. Gregory, 589 So. 2d 1250 (Miss. 1991) (where employee suffers from disease, cause of which is unknown but work environment somehow contributes to, aggravates, or accelerates, employee's condition is compensable); KLLM, Inc. v. Fowler, 589 So. 2d 670 (Miss. 1991) (amendment to MISS. CODE ANN. § 71-3-3(b) (Rev. 1989), adding phrase that employment must have "in a significant manner" contributed to, aggravated, or accelerated injury arising out of and in course of employment, was not intended to increase workers' burden of proof but to codify judicial interpretation of preceding statute); Matheson v. Favre, 586 So. 2d 833 (Miss. 1991)

Additionally, the court rendered decisions that involved specific procedural questions in the workers' compensation law context. One of the more expansive opinions in this respect was *Georgia Pacific Corp. v. Taplin*.[141] In *Taplin*, the supreme court faced the issue of whether an employer could invoke the statute of limitations provided in Section 71-3-35(1) of the Mississippi Code when the claimant-employee knew of his injury but did not discover its compensable nature until over a year after the accident and did not file for benefits until over two years after the accident.[142] After unsuccessfully asserting the statute of limitations defense at each level in the proceeding, the employer appealed to the Mississippi Supreme Court.[143] The court, however, affirmed, holding that "[t]he statute begins to run when the claimant is or reasonably should be aware of having sustained a compensable injury. . . ."[144] Moreover, the supreme court acknowledged that because Mississippi's laws are not designed to penalize workers when they cannot substantiate their entitlement to compensation even with their

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(where employee receives travel allowance, any injury sustained while commuting to or from work is deemed within scope of employment and is therefore compensable); McGowan v. Orleans Furniture, Inc., 586 So. 2d 163 (Miss. 1991) (employee is totally disabled within meaning of statute when he suffers physical injury which either prevents him from performing substantial acts of his usual occupation or renders it necessary that he cease work).

[141] 586 So. 2d 823 (Miss. 1991).

[142] *Taplin*, 586 So. 2d at 825. MISS. CODE ANN. § 71-3-35(1) (1972) provides a two year statute of limitations for filing an application for workers' compensation benefits with the Commission. An employee for Georgia Pacific Corporation, the claimant, Louis Taplin, was injured on August 8, 1983, during the course and scope of his employment when he fell from an elevated platform landing on his head and shoulder. *Taplin*, 586 So. 2d at 825. Taplin was hospitalized and diagnosed with having a sprained neck. *Id.* Georgia Pacific received a medical report from Taplin's doctor on August 18, 1983, linking Taplin's injury to his fall on August 8. *Id.* Taplin ultimately consulted four physicians for treatment for his neck and back pain before he found a doctor who could diagnose his condition. *Id.* The last physician Taplin consulted concluded that his injury was a degenerative disk condition, a disability undiscoverable until at least a year after the accident. *Id.* This doctor performed surgery on Taplin's neck vertebrae in August, 1985. *Id.* On August 9, 1985, Taplin filed for benefits to which Georgia Pacific responded asserting, *inter alia*, the affirmative defense of the statute of limitations. *Id.* at 825-26.

[143] *Id.* at 820. The A.L.J. found that Taplin had established periods of temporary total and partial disability and further that his permanent disability did not stem from any pre-existing condition as alleged by Georgia Pacific. *Id.* The Commission affirmed, modifying only the percentage of impairment found by the A.L.J. *Id.* Again, the employer appealed only to have the circuit court affirm the Commission's modified order. *Id.*

[144] *Id.* at 827. The court recognized that Mississippi's "basic rule" for latent discovery of injuries was first stated in Tabor Motor Co. v. Garrard, 233 So. 2d 811, 817 (Miss. 1970). *Taplin*, 586 So. 2d at 827.

physician's assistance, the statute is deemed not to begin running until the claimant's reasonably diligent efforts to obtain treatment yield medical confirmation of a compensable injury.[145] Thus, having determined that the statute of limitations began running when the employee's latent injuries were discovered by his treating physician, the court reasoned that the application for benefits in *Taplin* was filed within the limitation period.[146]

Another important 1991 case in the workers' compensation procedural context was the supreme court's consolidation of two appeals in *Bickham v. Department of Mental Health.*[147] The circuit courts in both cases granted an appeal from an interlocutory order of the Commission.[148] The Mississippi Supreme Court held that because in both cases the orders were clearly interlocutory in nature and further because only final orders are appealable under Mississippi's workers' compensation scheme,[149] the circuit courts' judgments on those interlocutory appeals were nullities.[150] The supreme court, therefore, dismissed the appeals for lack of jurisdiction, remanding the cases to the Commission.[151] Consequently, the court overruled *Sonford Products*

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[145] *Taplin*, 586 So. 2d at 827. Citing Struthers Wells-Gulfport, Inc. v. Bradford, 304 So. 2d 645, 649 (Miss. 1974), the court also noted that "the statute is tolled until the claimant has 'reason to foresee or ascertain' the likelihood of compensable injury 'from which incapacity and its extent can reasonably be ascertained by medical evidence.' " *Taplin*, 586 So. 2d at 827.

[146] *Taplin*, 586 So. 2d at 827. The supreme court further acknowledged the rule that for a claimant to be deemed to have acted reasonably, the claimant must file within the statute of limitations period once he becomes aware of the " 'nature, seriousness, and probable compensable character' " of his injury. *Id.* (quoting Quaker Oats Co. v. Miller, 370 So. 2d 1363, 1365-66 (Miss. 1979)).

[147] 592 So. 2d 96 (Miss. 1991).

[148] *Bickham*, 592 So. 2d at 97. In *Bickham*, the Circuit Court of Rankin County granted the appeal from the Commission's interlocutory order referring a claim sought to be reopened to the A.L.J. *Id.* The issue in *Bickham* was whether the claimant had experienced a sufficient change in her condition such that she could reopen her claim. *Id.* Likewise in *Spann*, an interlocutory Commission's order reopening a settled claim was appealed to the Circuit Court of the First Judicial District of Hinds County, which granted an appeal from the order. *Id.*

[149] *Id.* at 97. The court stated that no statutory authority existed which allowed an appeal "from anything other than a final order of the Commission," citing MISS. CODE ANN. § 71-3-51 (1972) and V. DUNN, MISSISSIPPI WORKERS' COMPENSATION § 285 (3d ed. 1982). *Bickham*, 592 So. 2d at 97.

[150] *Id.* at 98. The court reasoned that since the right of appeal is statutory, the circuit courts' authorization of the interlocutory appeals in the absence of clear statutory authority rendered their judgments void for want of jurisdiction. *Id.*

[151] *Id.* The supreme court concluded that it had no appellate jurisdiction since the circuit courts from whence the appeals at issue emanated never acquired jurisdiction. *Id.*

Corp. v. Freels[152] insofar as it held that a circuit court could grant an interlocutory appeal under certain circumstances.[153]

Finally, other cases in which the Mississippi Supreme Court rendered decisions on procedural issues affecting workers' compensation practice included statutory penalties for unpaid installments,[154] the extent of appellate review,[155] apportionment of benefits,[156] and the reopening of cases where final awards have been made.[157]

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[152] 495 So. 2d 468 (Miss. 1986).

[153] *Freels*, 495 So. 2d at 471. Declaring the decision in *Freels* to be erroneous, the court admonished the Bar and circuit court judges to "eschew any attempt to appeal a decision of the Commission which is not final." *Bickham*, 592 So. 2d at 98.

[154] Delchamps, Inc. v. Baygents, 528 So. 2d 620 (Miss. 1991) (though 15% statutory penalty provided by MISS. CODE ANN. § 11-3-23 (Supp. 1990) may not be imposed on appeal to circuit court from Commission, 10% and 20% penalties provided by MISS. CODE ANN. §§ 71-3-37(5) and (6) (1972) may be imposed upon same installments of compensation when compensation on which penalty is imposed is not limited to unpaid weekly installments).

[155] Walker Manuf. Co. v. Cantrell, 597 So. 2d 1243 (Miss. 1991) (circuit court, as intermediate court of appeal, must defer to Commission's findings of law and fact absent prejudicial error by Commission); Douglas & Lomason Co. v. Freeman, 590 So. 2d 124 (Miss. 1991) (A.L.J. abused his discretion in declining to permit presentation of rebuttal evidence when issue at claimant's reopening hearing was whether permission to reopen will be granted and A.L.J. decided case on merits, contemporaneously denying Commission's request to reopen for rebuttal evidence); South Miss. Power Ass'n v. Graham, 587 So. 2d 291 (Miss. 1991) (appellate courts may reverse Commission's order only where it is clearly erroneous and contrary to overwhelming weight of evidence).

[156] Mitchell Buick, Pontiac & Equip Co. v. Cash, 592 So. 2d 878 (Miss. 1991) (where preexisting condition is proven to be material contributing factor to claimant's injury, compensation shall be reduced in Commission's discretion pursuant to MISS. CODE ANN. § 71-3-7 (1972)); Delta CMI v. Speck, 586 So. 2d 768 (Miss. 1991) (absent showing of previous occupational disability, apportionment of benefits is improper under MISS. CODE ANN. § 71-3-7 (Supp. 1990)).

[157] Staples v. Blue Cross & Blue Shield of Miss., Inc., 585 So. 2d 747 (Miss. 1991) (Commission's failure to consider applicability of MISS. CODE ANN. § 71-3-53 (1972), providing Commission discretion to reopen cases, constitutes abuse of discretion when proper proof of mistake in Commission's factual determinations has been offered).

CIVIL PROCEDURE

The Mississippi Supreme Court rendered twenty-two decisions in the area of civil procedure in 1991. The intent of this review is to highlight those cases which have altered the current state of the law or clarified existing law. The four cases receiving textual treatment address the following civil procedure topics: amendments to pleadings,[1] personal jurisdiction,[2] Rule 11,[3] and venue.[4]

The remaining opinions decided by the court dealt with a variety of civil procedure issues including additur,[5] appeals,[6] attorney's fees,[7] final judgments,[8] judicial recusal,[9] orders,[10] review of judge's propriety,[11] statutory damages,[12] and summary judgment.[13]

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[1] Harrell v. Duncan, 593 So. 2d 1 (Miss. 1991) (when judgment or decree appealed from is reversed and remanded to trial court by Mississippi Supreme Court, such court has full power to allow any amendment to be made to pleadings which it had power to allow before judgment or decree appealed from was rendered); Bruce v. Bruce (Barnett), 587 So. 2d 898 (Miss. 1991) (motions calling into question correctness of all or part of any judgment, which are filed within time allowed by Miss. R. Civ. P. 59, are presumed to be filed under rule 49 without regard to how motion may be styled); Edwards v. Beasley, 577 So. 2d 384 (Miss. 1991) (if party adversary has failed to conform to Rule 10(d), counsel may file proper motion reasonably in advance of trial seeking compliance, failing which compliance he may be entitled to dismissal of complaint without prejudice).

[2] Jones v. Chandler, 592 So. 2d 966 (Miss. 1991) (in paternity actions, *in personam* jurisdiction may be exercised over non-resident putative father of illegitimate child begotten in Mississippi).

[3] Bean v. Broussard, 587 So. 2d 908 (Miss. 1991) (pursuant to its inherent authority, Mississippi courts are empowered to impose Rule 11 sanctions against both parties and attorneys).

[4] Dunn v. Dunn, 577 So. 2d 378 (Miss. 1991) (temporary absence by reasons of position do not change county of residence of party to suit for separate maintenance).

[5] Odom v. Roberts, No. 90-CA-0257 (Miss. July 24, 1991) (motion for new trial may be overruled upon condition of additur or remittitur even when court finds damages excessive due to bias or prejudice by trier of facts).

[6] Merritt v. Magnolia Federal Bank for Savings, 582 So. 2d 420 (Miss. 1991) (15% statutory penalty under Miss. Code Ann. § 11-3-23 (Supp. 1990) does not apply to affirmance of judgment involving real property where possession is not deprived or otherwise affected); Bruce v. Bruce (Barnett), No. 90-CA-0482 (Miss. March 27, 1991), *withdrawn, reh'g granted*, 587 So. 2d 898 (Miss. 1991) (chancery court's authority is limited to that found in Rule 60 where motion to amend judgment is filed under Miss. R. Civ. P. 59 and 60 subsequent to 10 days after entry of judgment); Sumrall v. City of Jackson, 576 So. 2d 1259 (Miss. 1991) (cases originating in municipal court, appealed to county court, and subsequently appealed to circuit court, must involve constitutional question to be appealed to Mississippi Supreme Court).

I. VENUE

In *Dunn v. Dunn*,[14] the court addressed the issue of whether temporary absence by reasons of position change the residence of a party.[15] Dr. and Mrs. Dunn owned a home in Brandon, Rankin County, Mississippi, and resided there until November

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[7] Griffin v. Griffin, 579 So. 2d 1266 (Miss. 1991) (opposing party is entitled to notice and due process in questioning reasonableness of attorney fee award which exceeds normal and customary fee).

[8] Sartain v. White, 588 So. 2d 204 (Miss. 1991) (appellant may not be granted Rule 60(b) relief based on incompetency unless appellant is ruled incompetent by court); Lose v. Illinois Cent. Gulf R.R., 584 So. 2d 1284 (Miss. 1991) (party moving to re-open case pursuant to MISS. R. CIV. P. (60(b)(6) will not be granted relief from final judgment except upon finding of "extra-ordinary circumstances" sufficient to tilt balance of equities in movant's favor).

[9] Ryals v. Pigott, 580 So. 2d 1140 (Miss. 1991) (party's failure to raise issue of recusal on timely basis results in waiver of right to have issue addressed).

[10] *In Re: Mississippi Rules of Civil Procedure*, No. 89-R-9901 (Miss. March 13, 1991) (amendments and official comments thereto rules 11, 26, 43, 45 and 83, pursuant to court order, have been adopted and ratified by Mississippi Supreme Court effective February 27, 1991).

[11] Wirtz v. Switzer, 586 So. 2d 775 (Miss. 1991) (in order to obtain review of trial judge's remarks or conduct during trial, objection must be made by counsel when remarks are made).

[12] Holliman v. Dale, 578 So. 2d 271 (Miss. 1991) (statutory damages pursuant to MISS. CODE ANN. § 11-3-23 (1972) should be determined on amount contested by appellant rather than on entire judgment).

[13] Scott v. City of Biloxi, 592 So. 2d 1003 (Miss. 1991) (best evidence is required to support conclusory affidavit when summary judgment is requested); Allen v. Mayer, 587 So. 2d 255 (Miss. 1991) (trial court must review all evidentiary matters in determining existence of genuine issue of material fact when considering motion for summary judgment); Webb v. Jackson, 583 So. 2d 946 (Miss. 1991) (summary judgment may not be granted when there exists genuine issues of material fact concerning local government entity's or employee's right to sovereign immunity); Malone v. Aetna Casualty & Sur. Co., 583 So. 2d 186 (Miss. 1991) (reasonable requests for additional time to complete discovery must be granted and all pertinent evidence considered before grant of summary judgment by trial date); Spartan Foods Sys., Inc. v. American Nat'l Ins. Co., 582 So. 2d 399 (Miss. 1991) (summary judgment may not be granted when there is uncertainty over correct interpretation of material fact in contract provision).

[14] 577 So. 2d 378 (Miss. 1991).

[15] *Dunn*, 577 So. 2d at 379. Dr. Dunn's testimony residence was located in Jackson, Hinds County, Mississippi. *Id.*

20, 1987, when Dr. Dunn left the home.[16] Dr. Dunn subsequently moved in as a guest with Mr. and Mrs. Hardwick in Jackson, Hinds County, Mississippi.[17] Mrs. Dunn filed a complaint for separate maintenance, and on January 25, 1988, Dr. Dunn was served a summons at the Hardwick residence in Hinds County, Mississippi.[18] Dr. Dunn responded by filing a cross-bill for divorce in which he timely objected to venue, also requesting a change of venue.[19] Dr. Dunn maintained that he still owned a home there, continued to practice medicine there, and was registered to vote there.[20] The chancery court overruled the motion for change of venue, agreed at trial with Mrs. Dunn's showing of proper venue, and granted her petition for separate maintenance.[21]

On appeal, Dr. Dunn argued, *inter alia*, that venue was improper.[22] The Mississippi Supreme Court reversed and remanded holding that the chancellor was manifestly wrong in finding that venue laid in Hinds Chancery Court.[23] The court first pointed out that venue for a separate maintenance suit is controlled by our general venue statute.[24] The court then went on to note that a defendant sued *in personam* shall be sued in the county of his residence.[25] Also, although the statute allows suit to be brought in the county where the defendant resides or may be found, the court interpreted "may be found" as a reference only to non-residents of the state, and to those who have no fixed place of residence within the state.[26] The court further stated that since Dr. Dunn still owned a home in Rankin County, still considered it his residence, and was registered to vote and did vote in Rankin County, that Rankin County was the residence of Dr. Dunn within the meaning of the general venue statute.[27] The court concluded by ruling that the chancellor should have declined to hear this matter and transferred the case to the Chancery Court of Rankin County.[28]

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[16] *Id.*. The Dunns were married and purchased their home on May 13, 1965. *Id.*

[17] *Id.* The Hardwicks resided at 3817 Meadowlane, Jackson, Hinds County, Mississippi. *Id.*

[18] *Id.* Mrs. Dunn filed her complaint on January 22, 1988. *Id.*

[19] *Id.* In Dr. Dunn's motion, he stated by affidavit that he had lived at 204 Harbor View Road, Brandon, Rankin County, Mississippi, from the summer of 1986 until November 20, 1987. *Id.*

[20] *Dunn*, 577 So. 2d at 379. Dr. Dunn considered himself merely a guest in the Hardwick's Hinds County home. *Id.*

[21] *Id.* The chancellor made numerous orders touching her support and maintenance. *Id.*

[22] *Id.* Dr. Dunn also appealed the other orders made by the chancellor. *Id.*

[23] *Id.* at 380. The case was remanded to the Chancery Court of Hinds County with instructions that it promptly transfer the action to the Rankin County Chancery Court under MISS. R. CIV. P. 82. *Id.*

[24] *Id.* at 379. *See* MISS. CODE ANN. § 11-5-1 (1972).

[25] *Dunn*, 577 So. 2d at 379 (citing Ross v. Ross, 208 So. 2d 194, 195 (Miss. 1968)).

II. RULE 11 SANCTIONS

In *Bean v. Broussard*,[29] the Mississippi Supreme Court addressed the issue of whether Mississippi circuit courts are empowered to impose Rule 11 sanctions against both a party and an attorney under the preamendment rule.[30]

Edwin L. Bean was associated by Sidney Landry in a medical malpractice action filed shortly before the tolling of the statute of limitations on August 6, 1987.[31] Dr. Curtis Broussard filed a motion for summary judgment on April 8, 1988, which was granted on April 28, 1988.[32] Broussard requested that the court impose Rule 11 sanctions upon Bean, Landry, and the plaintiffs, on the grounds that they signed a frivolous complaint for the purpose of delay.[33] On June 13, 1988, the court granted a monetary sanction upon Bean, Landry, and the Leblancs jointly and severally in the amount of $10,477.44.[34]

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[26] *Dunn*, 577 So. 2d at 379. The court recognized that "the statute holds no such intent that a resident may be caught on the wing and sued in any county where he may be temporarily found." *Id.* (citing *Ross*, 208 So. 2d at 195).

[27] *Dunn*, 577 So. 2d at 380. The court found the chancellor manifestly wrong when he found that Dr. Dunn's temporary residence in Hinds County gave the Hinds County Chancery Court jurisdiction and venue of this cause. *Id.*

[28] *Id. See also supra* note 23.

[29] 587 So. 2d 908 (Miss. 1991).

[30] *Bean*, 587 So. 2d at 911, n.4. MISS. R. CIV. P. 11(b) has since been amended to provide that sanctions may be imposed on "a party, or his attorney, or both." *Id.*

[31] *Bean*, 587 So. 2d at 910. Landry was engaged by the Leblancs after their child, Kimberly Leblanc, died from what was diagnosed as sudden infant death syndrome. *Id.* Dr. Broussard and Nurse Stokes had treated Kimberly for bronchitis one day prior to her death. *Id.* a 909. Landry was retained by the Leblancs for the purpose of filing suit against Dr. Broussard and Nurse Stokes for negligence in treating Kimberly. *Id.* at 910.

[32] *Id.* at 911. Dr. Broussard's motion was supported with affidavits of other doctors and documents attacking the lack of an evidentiary foundation for medical malpractice. *Id.* Counsel for the Leblancs filed no response to the motions for summary disposition. *Id.*

[33] *Id.* The complaint was dated April 27, 1988. *Id.*

On appeal, Bean argued that the circuit court was without authority to impose monetary sanctions against an attorney; that pursuant to MISS. R. CIV. P. 11(b), a court of record in this state is only permitted to impose sanctions against a party, not an attorney; and in the alternative, that such sanctions were not warranted in this case because he believed Leblanc's case to have merit.[35] The Mississippi Supreme Court reversed and remanded.[36] The court held that Mississippi circuit courts are empowered to impose Rule 11 sanctions against attorneys, the language in the rule notwithstanding.[37] The court began by acknowledging that MISS. R. CIV. PROC. 11(b)'s literal wording permits sanctions against a party, but does not include the word attorney.[38] However, the court noted that the official comment to the rule was intended to ensure that the trial court has sufficient power to deal forcefully and effectively with attorneys who may intentionally misuse the liberal notice pleadings system effectuated by these rules.[39] The court stated that the point of the rule in question was to explicate that which had been engrafted in the federal rule by court decision, the power to assess attorneys fees and costs in the event of a violation.[40] In sum, the court concluded that the circuit court, pursuant to its inherent authority, was empowered to impose sanctions against Bean, the language in the rule notwithstanding.[41] The court in deciding the case reversed and remanded, stating that based on the facts presented, the filing of the complaint was neither frivolous nor filed for purposes of harassment or delay.[42]

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[34] *Id.*

[35] *Id.* Broussard took issue with Bean's literal interpretation of the rule arguing that trial courts are empowered, via their inherent powers, to regulate the administration of justice and members of the bar; and in a proper case, sanctions are within a court's power. *Id.*

[36] *Bean*, 587 So. 2d at 913.

[37] *Id.*; *see* Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117, 119 (Miss. 1989) (Rule 11 vests in our trial courts discretionary authority to impose sanctions upon parties or attorneys).

[38] *Bean*, 587 So. 2d at 911. This wording would seem to support Bean's argument but the official comment to the rule states otherwise. *Id.*

[39] *Id.*; *see* MISS. R. CIV. P. 11 comment at 36 (1991).

[40] *Bean*, 587 So. 2d at 911. The court also noted that attorneys are officers of the court and the court has inherent authority to sanction them in proper cases. *Id.*

[41] *See supra* notes 37 and 40 and accompanying text.

III. PERSONAL JURISDICTION

In *Jones v. Chandler*,[43] the court determined whether *in personam* jurisdiction could be exercised over the non-resident putative father of an illegitimate child begotten in Mississippi.[44] Velma Hodges, a resident of Mississippi, dated Carl Jones, a resident of Tennessee, for some seven to eight months and allegedly begot Desmond Chandler.[45] On March 14, 1989, Desmond Chandler filed in the Chancery Court of Monroe County a complaint alleging that Carl Jones was his father, and demanded support and maintenance according to law.[46] Jones was served process in Memphis, Tennessee, and answered by denying that he was amenable to personal jurisdiction in Mississippi in this case.[47] Pursuant to an evidentiary hearing, the chancery court denied Jones' jurisdictional challenge.[48] The court then ordered Jones to provide for the support and maintenance of the minor child.[49]

Jones appealed arguing that the chancery court had no personal jurisdiction over him.[50] The Mississippi Supreme Court affirmed, holding that Mississippi law held amendable to suit a non-resident putative father who begets a child in Mississippi, with a resident of Mississippi.[51] The court based its opinion on both statutory and common law.[52] The court, citing Mississippi's long-arm statute, reasoned that conduct such as begetting a child can be construed as falling within the purview of the statute.[53] The court also used a quasi-contractual argument based on case precedent to hold the putative father subject to suit in Mississippi.[54] The court defined the begetting act coupled with the subsequent neglecting act as sufficient to render the putative father subject to suit in Mississippi.[55] The court concluded by stating that since the begetting act took place in Mississippi, and the child currently resides in this state, the putative father, Carl Jones, is wholly amendable to suit in this state.[56]

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[42] *Bean*, 587 So. 2d at 913. The court stated that there was no hint in the record of an attempt to harass. *Id.* While it is true that the complaint was filed in an effort to toll the statute of limitations, mere delay was not the objective. *Id.*

[43] 592 So. 2d 966 (Miss. 1991).

[44] *Id.* at 968.

[45] *Id.* Desmond Chandler was born on October 25, 1978. *Id.*

[46] *Id.* Desmond Chandler filed this suit through his mother and next friend, Velma Hodges. *Id.*

[47] *Id.* The chancery court held an evidentiary hearing on Jones' jurisdictional challenge. *Id.* Jones called Hodges adversely and elicited from her the essentials of the relationship between the two, including the fact that the two had sexual relations but were never married and never lived together as husband and wife. *Id.*

[48] *Jones*, 592 So. 2d at 969. On April 24, 1990, the chancery court found as a fact that Carl Jones is the father of Desmond Chandler. *Id.*

[49] *Id.* Jones was also ordered to pay attorneys fees, costs, and the like pursuant to MISS. CODE ANN. §§ 93-9-1, et. seq. (1972) and Supp. 1991).

[50] *Jones*, 592 So. 2d at 969. Jones presented no questions regarding the merits of the case. *Id.*

IV. AMENDMENTS TO JUDGMENTS

In *Bruce v. Bruce (Barnett)*,[57] the court reaffirmed its policy that a Rule 59 motion to alter or amend judgment negates a previously filed notice of appeal. This case came before the court on petition for rehearing seeking reconsideration of the court's decision of March 27, 1991.[58] On June 8, 1989, Barnett filed a motion for contempt and other relief seeking to alter her final divorce decree.[59] The chancery court entered a judgment modifying former decree on April 20, 1990.[60] Bruce then filed a notice of appeal and Barnett filed a motion to amend judgment several days later.[61] On June 1, 1990, the chancery court entered an order amending judgment which did in fact amend the April 20, 1990, judgment.[62] Barnett filed a motion to dismiss Bruce's appeal stating that her May 1, 1990, motion operated to stay the running of the time for perfecting an appeal and that this stay related back to April 20, 1990.[63] The Mississippi Supreme Court denied the motion to dismiss.[64]

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[51] *Id.* The court pointed out that if Jones had remained in Mississippi, there would exist no question as to his being amendable to a paternity suit here. *Id.*

[52] *See infra* notes 53-54.

[53] *Jones*, 592 So. 2d at 967; *see* Camp v. Roberts, 462 So. 2d 726, 727 (Miss. 1985) (construing MISS. CODE ANN. § 13-3-57 (Supp. 1990) "non-resident defendant committing criminal conversation here may be sued here").

[54] *Jones*, 592 So. 2d at 967; *see* Grisham v. Hinton, 490 So. 2d 1201, 1209 (Miss. 1986) (long existing and deeply embedded in our law we find unmistakable precedent that both resident and non-resident persons who, by their conduct in, or effects upon, this state, acquire otherwise enforceable duties toward this state's citizens, may be hauled into our court and, consistent with due process, required to answer for their defaults).

[55] *Jones*, 592 So. 2d at 968. The court noted that the support action was no more ancillary to the paternity suit than the child is to the begetting act. *Id.*

[56] *Id.* at 10. The court stated that the interests of this state and its people were adequate to hold persons such as Carl Jones amendable to suit here. *Id.*

[57] 587 So. 2d 898 (Miss. 1991).

[58] *See supra* note 1.

[59] *Bruce*, 587 So. 2d at 899. In 1975, the Chancery Court for the First Judicial District of Hinds County, Mississippi, entered its final judgment granting Rebecca Annell S. Bruce (Barnett) and Emmitt Russell Bruce a divorce. *Id.*

The Mississippi Supreme Court granted Bruce's petition for rehearing holding that since the motion had been filed within the time allowed by Rule 59, it is presumed to be a properly filed Rule 59 motion thereby effecting a stay of the time for appeal.[65] The court first pointed out that it had originally misconstrued the motion as one under Rule 60(b).[66] The court ruled that Barnett's motion fell under Rule 59(e).[67] The principle reason for this determination was the proposition that there is a preference for treating motions like the one Barnett filed as being made under Rule 59(e) rather than Rule 60(b).[68] The court concluded by stating that Barnett's properly filed Rule 59 motion effected the stay under Rule 4(d)[69] and brought into effect the rule's injunction that Bruce's previously filed notice of appeal be held for naught.[70]

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[60] *Id.* at 900. The court adjudged 13 separate issues, ranging from custody to medical insurance to college expenses. *Id.*

[61] *Id.* Bruce filed his notice of appeal on April 26, 1990. *Id.* Barnett filed her motion to amend judgment on May 1, 1990. *Id.*

[62] *Id.* The amendment effected only one of the thirteen paragraphs of the original judgment. *Id.* It effected no substantive change there, merely clarifying the time when Bruce's payments were to be due. *Id.*

[63] *Id.* Barnett argued that Bruce's notice given on April 26, 1990, was fatally premature and was ineffective to perfect an appeal. *Id.*

[64] *Bruce*, 587 So. 2d at 899. The denial of the motion to dismiss took place on March 27, 1991. *Id.*

[65] *Id.* at 904.

[66] *Id.* at 899-901. A Rule 60(b) motion does not stay the time for appeal and therefore would not serve to preserve Bruce's appeal. *Id.*

[67] *Id.* at 902. The court pointed out that although Rule 59(e) motions must generally be filed within 10 days, if the tenth day happens to fall on a legal holiday, then an automatic one-day extension is granted. *Id.* That was the situation regarding Barnett's May 1, 1990, motion and therefore served to make eligible her motion for consideration under Rule 59(e). *Id.*

[68] *Id.*; *see* Dalton v. First Interstate Bank of Denver, 863 F.2d 702, 703 (10th Cir. 1988) (this court has consistently held that regardless of how styled, motions questioning correctness of judgments, timely made within 10 days thereof, will be treated under Rule 59(e)).

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[69] *Bruce*, 587 So. 2d at 902. The court is referring to MISS. SUP. CT. R. 4(d).

[70] *Id.* at 903. The court also noted that Rule 59(e) motions go to the heart of the matter, to those issues predicate to a decision on the merits, whereas Rule 60(b) is for extraordinary circumstances, for matters collateral to the merits, and affords a much narrower range of relief than Rule 59(e). *Id.*

CONTRACTS AND COMMERCIAL LAW

In 1991, the Mississippi Supreme Court rendered decisions in contracts and commercial law cases which dealt with the following areas: auctioneer's liability;[1] negligent failure to read a contract,[2] materialmen's lien statute,[3] terminable-at-will employment contracts,[4] oral contracts to convey real property,[5] surety bonds,[6] joint construction accounts,[7] and breach of implied warranties.[8]

In *Jones v. Ballard*,[9] a case of first impression, the court determined the extent of an auctioneer's liability where the title to the goods conveyed at public auction contained a fatal defect and the principal for whom the goods were sold was not disclosed.[10]

Bill Jones, doing business as Sunbelt Auctions, offered for sale at public auction a used backhoe.[11] Jones did not disclose for whom he was selling the backhoe.[12] Dwayne D. Ballard purchased the backhoe at public auction for $10,500.[13] Thereafter, Ballard made repairs to the backhoe in excess of $1,000 and then sold it to a third party.[14] Subsequent to the backhoe's sale to the third party, a Mississippi Department of Public Safety officer examined the backhoe and determined it was stolen property, after which time the officer took possession of the backhoe and returned it to its lawful owner.[15] Ballard refunded the third party's purchase price and sought reimbursement from Jones for his purchase price, along with the cost of the repairs done on the backhoe.[16]

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[1] *See infra* notes 9-20 and accompanying text.

[2] *See infra* notes 21-41 and accompanying text.

[3] Associated Dealers Supply, Inc. v. Mississippi Roofing Supply, Inc., 589 So. 2d 1245 (Miss. 1991) (where proper application of materialmen's lien statute (Miss. Code Ann. § 85-7-181 (Supp. 1990)) is at issue and owner is charged with total construction of project, owner will be deemed general contractor under statute).

[4] *See infra* notes 43-52 and accompanying text.

[5] Koval v. Koval, 576 So. 2d 134 (Miss. 1991) (where oral contract conveying interest in real property is made and theories of unjust enrichment and equitable estoppel apply, claimant may recover damages notwithstanding statute of frauds).

[6] McBride v. Aetna Casualty & Surety Co., 583 So. 2d 974 (Miss. 1991) (where surety issues bond obligating itself to liability for "designated agent's" failure to fulfill his duties under § 63-21-13 of Mississippi Motor Vehicle Title Act, and designated agent fails to furnish valid certificate of title to first lienholder on automobile, surety cannot fulfill its obligations under bond by offering to act as surety on "Certificate of Title Bond" to be executed jointly by surety and owner, as principal, pursuant to Miss. Code Ann. § 63-21-23 (1972)).

[7] *See infra* notes 53-66 and accompanying text.

[8] *See infra* notes 67-84 and accompanying text.

[9] 573 So. 2d 783 (Miss. 1990).

[10] *Jones*, 573 So. 2d at 785-86.

[11] *Id.* at 784.

[12] *Id.* Robert Luckey of Clinton, Mississippi, delivered the backhoe to Jones under a consignment agreement which authorized Jones to sell it for an eight percent commis-

Relying on precedent from the United States Court of Appeals for the Fifth Circuit,[17] the Mississippi Supreme Court held that an auctioneer who sells property without divulging his principal is deemed to warrant title to goods he sells.[18] The court reasoned that an auctioneer is in a better position than buyers at the auction to ascertain title to property being sold.[19] The court did, however, state that an auctioneer may protect himself by disclosing his principal.[20]

In *Godfrey, Basset, & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*,[21] the Mississippi Supreme Court held that a party's negligent failure to read a contract before signing it does not preclude equitable relief from the contract where it is executed in reliance upon the false representations of the other contracting party.[22]

In 1988, the Copiah County Board of Education (the Board), employed Godfrey, Basset and Kuykendall Architects,

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sion. *Id.*

[13] *Id.*

[14] *Id.* Ballard sold the backhoe to Stan Black for $15,000. *Id.*

[15] *Id.* The backhoe was stolen from a Tennessee resident four days before Jones sold it to Ballard. *Id.*

[16] *Id.*

[17] *Id.* at 785-86 (citing McElroy v. Long, 170 F.2d 345, 347 (5th Cir. 1948) (auctioneer who sells property without divulging his principal is considered to be a vendor responsible to buyer for any deficiency in title in goods conveyed).

[18] *Jones*, 573 So. 2d at 785-86.

[19] *Id.* at 786 (citing State Bank of Independence v. Equity Livestock Auction Mkt., 417 N.W.2d 32, 34 (Wis. App. 1987).

[20] *Id.* at 786.

[21] 584 So. 2d 1254 (Miss. 1991).

[22] *Godfrey*, 584 So. 2d at 1259-60.

Ltd. (Godfrey firm) to render all architectural services required by the county school district on the Crystal Springs school renovation project.[23] The Godfrey firm prepared the plans and specifications for the project which included a requirement that all bids contain a $9,000 contingency clause that covered latent conditions discovered during the project.[24] Subsequently, the Godfrey firm mailed an addendum to all bidders which omitted the $9,000 contingency requirement from the bid.[25] Ultimately, the Board rejected all bids and reduced the size of the project.[26] As a result, the Godfrey firm revised the original plans and specifications to reflect the scaled-down project.[27] T.A. Huntington, Jr., owner of Huntington Lumber and Supply Company, noticed that the revised specifications contained a contingency clause and contacted the Godfrey firm to ascertain whether the clause would be omitted through an addendum as the original specifications had been.[28] Huntington spoke directly to Arthur Godfrey, the senior member of the Godfrey firm, who assured him the firm would mail an addendum omitting the clause.[29] However, a junior member of the firm prepared the addendum and negligently failed to omit the contingency clause.[30] Consequently, Huntington's bid was accepted as the lowest bid.[31] At the request of the Board, Huntington began work on the project immediately.[32] Several weeks after work on the project had begun, Huntington signed the contract which referenced the addendum to the revised specifications.[33] However, Huntington had not read the addendum.[34] Subsequently, Huntington learned that the addendum did not omit the contingency clause.[35] After the Board discovered Huntington was not the low bidder without the contingency clause, it deducted $9,000 from the final payment to Huntington.[36] Thereafter, Huntington sued Godfrey and the school district in the Circuit Court of Copiah County and, following a jury trial, was awarded a $9,000 judgment against the Godfrey firm.[37]

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[23] *Id.* at 1254-55. The high school cafeteria, business department, and library, along with the air conditioning in the elementary classrooms, were to be renovated. *Id.*

[24] *Id.* at 1255.

[25] *Id.*

[26] *Id.* The lowest bid exceeded $300,000 and constituted more than the school district was prepared to pay for the project. *Id.*

[27] *Godfrey*, 584 So. 2d at 1255.

[28] *Id.* at 1255-56.

[29] *Id.* at 1256. Huntington and Godfrey had known each other for several years and were friends. *Id.*

[30] *Id.*

[31] *Id.*

[32] *Godfrey*, 584 So. 2d at 1256.

[33] *Id.*

[34] *Id.* The junior member of the Godfrey firm, who had prepared the addendum,

The Mississippi Supreme Court affirmed, holding that Huntington was not barred from relief for failure to read the addendum to the specifications before signing the contract.[38] The court stated that it was a sound rule of law to allow an aggrieved party equitable relief despite one's own negligence in executing a contract in justifiable reliance on the false representations of the other contracting party.[39] The court noted that Godfrey was the senior member of the Godfrey firm which authored the contract and accompanying plans and specifications.[40] Accordingly, the court concluded that Huntington was entitled to rely on Godfrey's representation and that Huntington's negligence resulted directly from Godfrey's misrepresentation.[41]

In *American Chocolates, Inc. v. Mascot Pecan Co.*,[42] the Mississippi Supreme Court held that terminable-at-will employment contracts are subject to cancellation by either party upon reasonable notice but only as to executory functions yet to be performed.[43]

American Chocolates, Inc., entered into an oral brokerage agreement with Mascot Pecan, Inc., under which American Chocolates attempted to secure Henco as a customer of Mascot

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informed Huntington that his contract contained a contingency clause. *Id.*

[35] *Id.* The Board deducted the $9,000 from the contract reliance upon an Attorney General opinion it had requested. *Id.*

[36] *Id.*

[37] *Id.* at 1258-60.

[38] *Id.* (citing Plains Cotton Coop. Ass'n v. Wolf, 553 S.W.2d 800, 803 (Tex. Civ. App. 1977)).

[39] *Id.* at 1259.

[40] *Id.*

[41] *Id.*

[42] 592 So. 2d 93 (Miss. 1991).

[43] *American Chocolates*, 592 So. 2d at 95.

Pecan.[44] The agreement provided that if American Chocolate could secure Henco as a customer of Mascot Pecan, then American Chocolates would receive a five percent commission on the sales price of all products sold by Mascot to Henco.[45] American Chocolates secured Henco as a customer of Mascot Pecan and received the five percent commission until problems arose between Mascot Pecan and Henco.[46] Mascot Pecan and Henco settled their problems by making adjustments in costs which ultimately reduced American Chocolates' commission to zero.[47] Thereafter, Mascot Pecan terminated its agreement with American Chocolates, after which American Chocolates filed suit alleging, *inter alia*, breach of contract by Mascot Pecan.[48]

The Mississippi Supreme Court stated that when one party to an oral contract completes performance, the Statute of Frauds has no application.[49] The court found the contract between American Chocolates and Mascot Pecan outside the Statute of Frauds because American Chocolates had completed performance when it secured Henco as a customer for Mascot Pecan.[50] Additionally, the court stated Mascot Pecan had a right to terminate the contract because it was of indefinite duration but that the cancellation only affected executory functions yet to be performed.[51] Accordingly, the court explained that since American Chocolates had fulfilled the agreement, the consideration agreed upon by Mascot Pecan must be paid in accordance with the contract under which it was given.[52]

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[44] *Id.* at 94. Mascot Pecan produced candy products. *Id.*

[45] *Id.*

[46] *Id.* Mascot Pecan began having problems in distribution, consistency and quality of the product. *Id.*

[47] *Id.*

[48] *Id.* Mascot Pecan contended it terminated the agreement to comply with Henco's desire to reduce costs. *Id.* As a result, American Chocolates also filed suit against Henco for tortious interference with a contractual relationship. *Id.*

[49] *Id.* at 95 (citing *inter alia* Gibbons v. Associated Distributors, 370 So. 2d 925, 927 (Miss. 1979) (general rule is that complete performance by one party of oral contract not to be performed within statutory prohibited period—15 months—takes contract outside of Statute of Frauds).

[50] *American Chocolates*, 592 So. 2d at 94.

[51] *Id.* at 95 (citing *inter alia* King v. Exxon, U.S.A., 618 F.2d 1111, 1119 (5th Cir. 1980) and Cessna Aircraft Co. v. Aviation, Inc., 243 F.2d, 815, 818 (10th Cir. 1957)).

[52] *Id.* (citing Linn v. Employers Reinsurance Corp., 153 A.2d 483, 485-86 (Pa. 1959).

In *Deposit Guaranty National Bank v. Pete*,[53] the Mississippi Supreme Court held that where a mortgagor and contractor set up a joint construction account to which the contractor has unrestricted access to the funds, the account is subject to garnishment upon a judgment against the contractor.[54]

Mr. and Mrs. Art Washington contracted with William E. Jones to construct a house for them at a price of $70,000.[55] After the Washingtons borrowed $65,000 from Deposit Guaranty National Bank (Deposit Guaranty), Art Washington opened a joint construction account in his and Jones' name.[56] Thereafter, Joseph and Mary L. Pete obtained a judgment against Jones for $22,755 and sought to garnish any of his assets held by Deposit Guaranty.[57] Deposit Guaranty took the position that Jones had no interest in the construction account and denied holding any of his assets.[58] After Deposit Guaranty was served with a writ of garnishment directed at Jones' assets, Jones wrote checks payable to himself totalling $87,322.25.[59]

The Hinds County Circuit Court upheld a county court judgment in favor of the Petes against the bank.[60] Deposit Guaranty appealed and asserted the money in the joint account belonged to Washington, not Jones.[61]

The Mississippi Supreme Court affirmed, holding that the funds Jones paid to himself were subject to execution.[62] The court noted Jones was free to write checks drawn on the construction account as he pleased and that he determined whether or not a check should be written.[63] The court reasoned the account was not a true trust account as evidenced by Jones' lack of documentation as to where the funds were spent and the fact that Jones paid some of the money to himself.[64] Accordingly, the court stated "Jones' actions were indicia of a claim in the funds, and not those of a mere stakeholder or naked trustee."[65] The court also stated Deposit Guaranty knew the entire construction account was subject to garnishment, and when it was served with the writ, the law presumed the entire account belonged to Jones, and yet the bank did nothing to protect itself or the Petes.[66]

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[53] 583 So. 2d 180 (Miss. 1991).

[54] *Pete*, 583 So. 2d at 183-84.

[55] *Id.* at 180.

[56] *Id.* Washington opened the account to pay for labor and materials furnished in construction. *Id.* From this account Jones wrote 43 checks payable to himself, laborers and materialmen. *Id.* at 181. The checks made payable to Jones totaled $8,322.25. *Id.* Jones was unable to document that any of the $8,322.25 went into the Washington house. *Id.*

[57] *Id.* at 180.

[58] *Id.*

[59] *Pete*, 583 So. 2d at 180.

[60] *Id.*

[61] *Id.* at 182.

[62] *Id.* at 182-83. The court relied on a parallel case, Cupit v. Brooks, 112 So. 2d 813 (1959) that involved a joint account held by Cupit and his second wife who supplied all the funds. The *Cupit* court reasoned that while the wife no doubt claimed ownership of the entire account, the "indicia of ownership" by the husband's acts were sufficient to hold it subject to garnishment by his first wife. *Id.* at 182 (citing *Cupit*, 112 So. 2d at 814-15).

In *Gast v. Rogers-Dingus Chevrolet*,[67] the Mississippi Supreme Court held that to effectuate a cause of action for breach of the implied warranty of merchantability, a purchaser must prove revocation of acceptance and give notice thereof to the seller so as to avail himself of the measure of damages for breach under the Uniform Commercial Code.[68]

On April 10, 1986, Kim Allen and Kimberly Dawn Gast (Gasts) purchased a used automobile from Rogers-Dingus Chevrolet (Rogers-Dingus).[69] Rogers-Dingus assisted the Gasts in obtaining financing through their "dealer arrangement" with Citizens Bank of Rankin County.[70] Under the arrangement, Rogers-Dingus financed the purchase price of the automobile, net of the Gasts' down payment, and obtained from the Gasts an installment note for the net purchase price as well as obtaining a security interest in the vehicle.[71] Thereafter, the documents were assigned to Citizens Bank.[72] Soon after the Gasts purchased the car they experienced a series of mechanical problems which required repairs.[73] Ultimately, the Gasts' refused to make payments on their note and with the Gasts' consent, the bank took possession of the car and sold it, applying the proceeds to the note.[74] The Gasts then filed suit against Rogers-Dingus for breach of implied warranties of merchantability and fitness for a particular purpose.[75] The jury returned a verdict for the Gasts.[76] Rogers-Dingus moved for a judgment notwithstanding the verdict which the court granted after it found, *inter alia*, the Gasts failed to show revocation of acceptance.[77] The Gasts appealed, asserting that their action in turning the vehicle over to the bank and its subsequent sale constituted revocation in addition to notification thereof.[78] The Gasts argued there was proper revocation because of the bank's close working relationship and contractual ties with Rogers-Dingus.[79]

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[63] *Pete*, 583 So. 2d at 182-83.

[64] *Id.*

[65] *Id.*

[66] *Id.* (citing Delta Fertilizer v. Weaver, 547 So. 2d 800 (Miss. 1989)).

[67] 585 So. 2d 725 (Miss. 1991).

[68] Miss. Code Ann. § 75-2-711 (Supp. 1990) provides the measure of damages for breach of the implied warranty of merchantability when the buyer justifiably revokes acceptance. The section provides:

> (1) where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2612) § 875-2-612], the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
>
> > (a) "cover" and have damages under section 75-2-712 as to all the goods affected whether or not they have been identified to the contract; or
> >
> > (b) recover damages for nondelivery as provided in this chapter (Section 2-713) § 75-2-713].

Miss. Code Ann. § 75-2-711 (Supp. 1990).

[69] *Gast*, 585 So. 2d at 726.

The Mississippi Supreme Court affirmed, holding there was a lack of proper revocation because the Gasts had not returned the car to the dealer and had not established an agency relationship between the bank and Rogers-Dingus.[80] Additionally, the court stated the Gasts' actions in turning the vehicle over to the bank for sale, with the subsequent application of the sales proceeds to their outstanding loan balance was "contrary to any justifiable revocation of acceptance."[81] Furthermore, the court found Rogers-Dingus had not received notice of the attempted revocation.[82] However, the court stated that it would not adopt a rigid rule which required notice of revocation as a prerequisite to filing suit for breach of warranty.[83] Instead, the court stated that in cases involving a series of complaints and attempted repairs, notice of revocation should be made prior to filing a complaint for breach of warranty for damages pursuant to section 75-2-711 of the Mississippi Code.[84]

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 727. Agents of Rogers-Dingus assured the Gasts that the automobile was a "good running car." *Id.* However, the car developed problems from the first day of purchase. *Id.* For example, the speedometer cable broke within one month after purchase and later, the water pump broke. *Id.* On August 2, 1986, the automobile caught on fire, and Rogers-Dingus rebuilt the engine and replaced the turbo. *Id.* After additional repairs in September of 1986, the Gasts informed Rogers-Dingus that they no longer wanted the auto. *Id.* However, Rogers-Dingus would not agree to a trade-in. *Id.*

[74] *Gast*, 585 So. 2d at 727.

[75] *Id.*

[76] *Id.*

[77] *Id*

[78] *Id.* at 727-29.

[79] *Gast*, 585 So. 2d at 728.

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[80] *Id.* at 729. The court also stated a buyer is generally deemed to have accepted defective goods when, knowing of the defect, he resells the goods without notifying the seller. *Id.* (citing *inter alia* White and Sumners, Uniform Commercial Code, § 8-2, 395 (2d 3d. 1980)).

[81] *Gast*, 585 So. 2d at 729 (citing Miss. Code Ann. § 75-2-606(1)(c), § 75-2-608(2) (Supp. 1990)).

[82] *Gast*, 585 So. 2d at 729.

[83] *Id.*

[84] *Id.*

CRIMINAL LAW

I. Introduction

In 1991, the Mississippi Supreme Court handed down decisions in over one hundred cases concerning criminal law. This review, however, will address textually only those decisions which affected Mississippi law; all others will be discussed in footnotes. Those areas in which the court rendered decisions included fourth amendment,[1] fifth amendment,[2] and sixth amendment[3] rights of a criminal defendant; evidence;[4] jury selection,[5] specific jury instructions,[6] and other jury issues;[7] post-conviction relief;[8] specific criminal statutes;[9] and trial procedure.[10]

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[1] *See infra* notes 11-24 and accompanying text.

[2] Kuykendall v. State, 585 So. 2d 773 (Miss. 1991) (when accused makes equivocal statement suggesting request for counsel, interrogation may continue only for narrow purpose of ascertaining meaning of equivocal statement, and interrogating officer must assist in clarifying accused's statement); Mohr v. State, 584 So. 2d 426 (Miss. 1991) (accused's request for his mental health counselor does not invoke defendant's Fifth Amendment rights); Balfour v. State, 580 So. 2d 1203 (Miss. 1991) (when accused has invoked his right to have counsel present during custodial interrogation, accused does not waive his rights in absence of counsel by responding to further police-initiated interrogation, even if he has been advised of his rights); Riddle v. State, 580 So. 2d 1195 (Miss. 1991) (if accused indicates in any manner that he wishes access to counsel, interrogation without counsel allowed only if accused himself initiates it).

[3] *See infra* notes 25-37 and accompanying text.

[4] *See infra* notes 38-88 and accompanying text.

[5] *See infra* notes 89-103 and accompanying text.

[6] Wilson v. State, 592 So. 2d 993 (Miss. 1991) (judge must instruct jury that all elements must be proven beyond reasonable doubt); Williams v. State, 589 So. 2d 1278 (Miss. 1991) (judge entitled to deny requested jury instruction advising that jury did not have to believe defendant was innocent in order to return not guilty verdict); Robinson v. State, 589 So. 2d 116 (Miss. 1991) (citing Gangl v. State, 539 So. 2d 132 (Miss. 1991)) (in order for trial judge to refuse to give lesser-included offense instruction, evidence, viewed most favorably to defendant, could allow no reasonable juror to find defendant guilty of lesser-included offense); Reynolds v. State, 585 So. 2d 753 (Miss. 1991) (judge may mention deterrence in sentencing instructions if instructions are particularized to defendant); Settles v. State, 584 So. 2d 1260 (Miss. 1991) (armed robbery instruction must specifically set out elements of taking of property and putting person in fear); Graham v. State, 582 So. 2d 1014 (Miss. 1991) (before trial judge grants instruction for lesser-included offense, he must be able to say that reasonable jury could find that at least one essential element of principal charge had not been met); Taylor v. State, 577 So. 2d 381 (Miss. 1991) (in determining whether defendant is entitled to lesser-included offense instruction, disparity between offenses should be considered, and instruction

II. CONSTITUTIONAL LAW

A. *Fourth Amendment*

The Mississippi Supreme Court ruled on a number of issues regarding a criminal defendant's Fourth Amendment right to be free of unreasonable search and seizure, including the following: the "fruit of the poisonous tree" doctrine,[11] the "totality of circumstances" test for probable cause in issuing a search warrant,[12] the warrantless search of an immobilized vehicle,[13] the necessity of affiant's signature on every page of the affidavit for search warrant,[14] and whether a search by voluntary firefighters

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should be denied only when evidence could justify conviction of only principal charge); Burke v. State, 576 So. 2d 1239 (Miss. 1991) (court should give cautionary instruction regarding credibility of witness where witness is alleged accomplice and testimony is uncorroborated).

[7] Holland v. State, 587 So. 2d 848 (Miss. 1991) (right to fair hearing at sentencing stage can be prejudiced by jury's attempt to recommend death penalty before sentencing phase); Minter v. State, 583 So. 2d 973 (Miss. 1991) (appellant's state of mind could be shown only by his conduct, and it was for jury to determine whether appellant knew property was stolen).

[8] *See infra* notes 104-132 and accompanying text.

[9] *See infra* notes 133-147 and accompanying text.

[10] Gowdy v. State, 592 So. 2d 29 (Miss. 1991) (State is required to disclose names and addresses of informants who are material witnesses or who participated in crime); Williams v. State, 590 So. 2d 1374 (Miss. 1991) (request for special venire due when court announces ready for trial); Hughes v. State, 589 So. 2d 112 (Miss. 1991) (new trial must be granted when trial court's denial of motion for continuance raises doubt that defendant received fair trial); Traylor v. State, 582 So. 2d 1003 (Miss. 1991) (defendant entitled to postponement of proceedings when State is tardy in furnishing discovery); Anderson v. State, 577 So. 2d 390 (Miss. 1991) (valid guilty plea operates as waiver of right to speedy trial).

[11] Marshall v. State, 584 So. 2d 437, 438 (Miss. 1991) (marijuana seized during surveillance conducted upon discovery of large bag of marijuana during warrantless search of defendant's room was "fruit of poisonous tree," and therefore should have been excluded).

[12] Pipkins v. State, 592 So. 2d 947, 951 (Miss. 1991) (defendant is entitled to hearing to determine whether there was probable cause for issuance of search warrant if defendant makes preliminary showing that statements contained in affidavit for search warrant were knowingly or intentionally false, or made in reckless disregard for truth).

[13] Franklin v. State, 587 So. 2d 905, 907 (Miss. 1991) ("automobile exception" to search warrant requirement includes immobilized vehicles as well).

[14] Williams v. State, 583 So. 2d 620, 623-24 (Miss. 1991) (court held that MBN agent's failure to sign page of affidavit for search warrant which contained description of

should be subject to Fourth Amendment standards.[15]

The court held in *Rose v. State* that volunteer firefighters should be subject to the same Fourth Amendment standards as salaried, city-sponsored firefighters.[16] The court reasoned that the experiences, observations and firefighting practices and procedures of volunteer firefighters at the fire scene should be identical to those of firefighters paid salaries by local governments.[17] Therefore, the court held, there is no logic in making a distinction in the Fourth Amendment standards to which the firefighters are subject.[18]

Applying the foregoing analysis, the court held that certain testimony of the volunteer firefighters regarding apparent evidence of arson should have been excluded at trial.[19] The court held that firefighters, whether voluntary or paid, need not obtain a warrant or secure the owner's consent prior to entering and inspecting fire-damaged premises.[20] Furthermore, any evidence of arson which is in plain view of the firefighters may be seized during their search for the origin of the fire or any "hot spots" that may rekindle the blaze.[21]

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property to be searched would not invalidate search warrant where agent swore that description was not substituted and defendants offered only speculation to contrary).

[15] *See infra* notes 6-14 and accompanying text.

[16] 586 So. 2d 746 (Miss. 1991).

[17] *Rose*, 586 So. 2d at 752. The court found that the volunteer firefighters received state sponsored training and depended upon the local taxing district for financial support. *Id.*

[18] *Id.* The court found "no logic in a result wherein the volunteers would have free rein with their search of the premises and collection of evidence while the governmental, paid forces would be restricted under well settled principles of constitutional search and seizure law." *Id.*; *see also* Michigan v. Tyler, 436 U.S. 499, 506, 98 S. Ct. 1942, 1948 (1978) ("[T]here is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman . . .").

[19] *Id.* at 753. The trial court allowed the firemen to testify as to the absence of personal items in the bathroom medicine cabinet, the bedroom closet and a chest of drawers, as well as the lack of silverware and dishes except those in the dishwasher. *Id.* at 749-50.

[20] *Id.* at 751-52. The court quoted the U.S. Supreme Court in holding that the aftermath of a fire is an exigency which will not "tolerate the delay necessary to obtain a warrant or to secure the owner's consent to inspect fire-damaged premises." *Id.* at 753 (quoting Michigan v. Clifford, 464 U.S. 287, 293, 104 S. Ct. 641, 647 (1984)).

[21] *Id.* at 753 (citing Michigan v. Tyler, 436 U.S. 499, 509, 98 S. Ct. 1942, 1950 (1978)). The court held that testimony regarding the contents of the medicine cabinet

However, the court explained that the scope of the search may be no broader than reasonably necessary to achieve its end, and cannot grow into a search for further evidence of criminal activity.[22] As such, the court held that testimony of the firefighters regarding evidence of arson which was not in plain view of the firefighters during the course of their standard procedure was improperly admitted.[23] The court therefore reversed the arson conviction and remanded for new trial consistent with the court's ruling.[24]

B. Sixth Amendment

The Mississippi Supreme Court decided several cases during 1991 concerning the Sixth Amendment right to a speedy trial[25] and effective assistance of counsel.[26]

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were properly admitted since the bathroom door and medicine cabinet were both "standing open." Likewise, testimony regarding the contents of the closet was admissible since it was established at trial that checking all closets for hot spots was standard procedure. *Rose*, 586 So. 2d at 753.

[22] *Rose*, 586 So. 2d at 753. The court noted that, despite the exigency of the fire, a search by the firefighters to gather evidence of arson not in plain view must be made pursuant to a criminal warrant issued upon the traditional showing of probable cause. *Id.* at 754.

[23] *Id.* The court held that testimony as to the contents of the chest of drawers and the dishwasher was improperly admitted into evidence since the search producing the evidence was outside the scope of the firefighter's limited objective. *Id.*

[24] *Id.* at 755. Justice Hawkins, in a separate dissenting opinion, distinguished the facts of *Rose* from those of *Michigan v. Tyler*, since the firemen were lawfully on the premises at the time of the search, and there was nothing unreasonable about the search of the bureau and the dishwasher. *Id.* at 756.

[25] *See infra* notes 24-35 and accompanying text; *see also infra* notes 42-49 and accompanying text (addressing statutory deadline for speedy trial prescribed by MISS. CODE ANN. § 99-17-1).

[26] Ivy v. State, 589 So. 2d 1263, 1265 (Miss. 1991) (mere fact that attorney did not file motion for discovery is not sufficient to raise ineffective assistance of counsel claim under two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)); Robinson v. State, 585 So. 2d 735, 737 (Miss. 1991) (counsel enjoys strong presumption of competence, and claim of ineffective assistance of counsel requires that court consider whether shortcomings of counsel amount to deficient performance on part of trial counsel, and if so, whether there is reasonable probability that, but for counsel's errors, result of proceeding would have been different); Riddle v. State, 580 So. 2d 1195, 1201 (Miss. 1991) (defendant has burden of proving that attorney's performance was deficient; it is not per se professionally unreasonable for attorney to allow client to talk to police and give statement in absence of counsel); Barnes v. State, 577 So. 2d 840, 841 (Miss. 1991) (to prove ineffective assistance of counsel claim, defendant must show that counsel's per-

The court analyzed several claims that the respective defendant was denied his Sixth Amendment right to a speedy trial under the four-part test espoused by the Supreme Court in *Barker v. Wingo*[27] and its progeny.[28] The Mississippi Supreme Court in *State v. Ferguson*[29] explained that *Barker* and its progeny require a sensitive weighing and balancing of the four relevant factors.[30]

The court in *Ferguson* held that where a defendant asserts a claim that his right to a speedy *retrial* has been violated, the speedy trial clock begins to run on the date the court reversed the defendant's original conviction.[31] The first *Barker* factor, the length of the delay, operates as a triggering mechanism. That is, if the delay is not presumptively prejudicial, then there is no need for further inquiry.[32]

Closely related to the first factor of length of delay is the government's justification for the delay.[33] Once the court finds the delay presumptively prejudicial, the burden shifts to the prosecutor to produce evidence justifying the delay. Where the accused has not caused the delay, and where the prosecution has failed to show good cause therefor, this second factor weighs in

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formance was deficient and that this deficient performance prejudiced accused's defense); Knight v. State, 577 So. 2d 392, 394 (Miss. 1991) (same).

[27] 407 U.S. 514, 92 S. Ct. 2182 (1972).

[28] *See Barker*, 407 U.S. at 530-33, 92 S. Ct. at 2192-93. Where constitutional speedy trial rights are asserted, *Barker v. Wingo* mandates that the court consider (1) length of delay, (2) reason for delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Id.*

[29] 576 So. 2d 1252 (Miss. 1991).

[30] *Ferguson*, 576 So. 2d at 1254.

[31] *Id.* Generally, the constitutional right to a speedy trial attaches and begins to run "at the time of a formal indictment or information or else the actual restraints imposed by arrest and holding to a criminal charge." Spencer v. State, 592 So. 2d 1382 (Miss. 1991) (quoting Handley v. State, 574 So. 2d 671, 674 (Miss. 1990). The statutory right to speedy trial, codified at MISS. CODE ANN. § 99-17-1, attaches and the clock begins to run at the time of arraignment. Wiley v. State, 582 So. 2d 1008, 1011 (Miss. 1991).

[32] Spencer v. State, No. 89-KA-1242, slip op. at 8 (Miss. 1991). Whether the length of delay will provoke further inquiry is necessarily dependent upon the peculiar circumstances of each case. Wiley v. State, 582 So. 2d 1008, 1011 (Miss. 1991). The Mississippi Supreme Court recognized that a delay of eight months or more is presumptively prejudicial. *Spencer*, slip op. at 8.

[33] *Wiley*, 582 So. 2d at 1012.

favor of the accused.[34]

The third prong of the *Barker* test, whether the defendant asserted his right, will weigh heavily in the defendant's favor if it has been asserted.[35] Finally, the prosecution has the burden of proving that the defendant was not prejudiced as a result of this delay.[36] While an affirmative showing of prejudice by the defendant is not absolutely necessary to prove a denial of the constitutional right to a speedy trial, a showing of prejudice adds considerable weight to the defendant's claim.[37]

III. EVIDENCE

In 1991 the court reviewed a number of evidentiary matters, including questions about evidence of other crimes,[38] a defendant's status as a habitual offender,[39] inflammatory photographs,[40] and admissions,[41] as well as questions concerning evidence of participation in conspiracy,[42] sufficiency of evidence,[43] constructive possession of contraband,[44] weight of eyewitness testimony,[45] interrogations,[46] confessions,[47] authentication of foreign convictions,[48] receiving stolen goods,[49] testimony about conviction of accomplices,[50] discovery,[51] entrapment,[52] and chain of custody.[53]

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[34] *Ferguson*, 576 So. 2d at 1254. Where counsel for the defendant withdraws from representation, and new counsel must be appointed, a reasonable delay is necessary to allow counsel to familiarize himself with the case, and this delay should not be charged against the State; otherwise, the defendant might be prejudiced by the State's attempt to expedite the trial. *Wiley*, 582 So. 2d at 1012.

[35] *Ferguson*, 576 So. 2d at 1255. Although this third factor is afforded strong evidentiary weight, the defendant's failure to assert his right until the day before trial weighs against him in the constitutional analysis. *Spencer*, slip op. at 9. *But see Wiley*, 582 So. 2d at 1012-13 (fact that defendant did not assert right until day before trial did not weigh against him since he was practically without counsel due to changes in his attorney).

[36] *Ferguson*, 576 So. 2d at 1255. This burden shifts to the prosecution upon a finding that the length of delay was presumptively prejudicial. *Id.*

[37] *Wiley*, 582 So. 2d at 1013. *Barker* identified three elements of prejudice to be considered: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Spencer*, slip op. at 9.

[38] Hogan v. State, 580 So. 2d 1275, 1277 (Miss. 1991) (under Mississippi Rules of Evidence, fact of crime in which defendant has not taken part is admissible when material to prove his motive for committing crime with which he has been charged).

[39] Ladner v. State, 584 So. 2d 743, 758-59 (Miss. 1991) (trial court must allow defendant to inform jury at sentencing phase that he will be ineligible for parole even if court has not yet adjudicated him habitual offender).

[40] Wade v. State, 583 So. 2d 965, 967 (Miss. 1991) (reversible error to admit obscene photographs not relevant to crime).

[41] Gayten v. State, No. 89-KA-1195 (Miss. Sept. 11, 1991) (opinion withdrawn and superceded on rehearing by Gayten v. State, 1992 WL 30110 (Miss.))

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[42] King v. State, 580 So. 2d 1182, 1188 (Miss. 1991) (neither presence at scene of crime nor association with conspirators, without more, is sufficient to establish conspiracy, even where defendant knows crime is being committed) (citing Davis v. State, 485 So. 2d 1055, 1058 (Miss. 1986)).

[43] Tubwell v. State, 580 So. 2d 1264, 1266-67 (Miss. 1991) (naked possession of stolen property, standing alone, cannot support conviction of receiving stolen goods); Corbin v. State, 585 So. 2d 713, 715-16 (Miss. 1991) (defendant's fingerprint on stolen property insufficient for conviction of burglary where that evidence not corroborated by any other proof of guilt); Thomas v. State, 591 So. 2d 837, 839 (Miss. 1991) (statements made by unidentified person and heard through door insufficient to support conviction of conspiracy).

[44] Cunningham v. State, 583 So. 2d 960, 962 (Miss. 1991) (finding of constructive possession will be sustained only where evidence shows that defendant consciously exercised control over contraband found on premises); Clayton v. State, 582 So. 2d 1019, 1021-22 (Miss. 1991) (additional incriminating facts must be shown to support conviction of possession of contraband where premises upon which contraband is found are not within accused's exclusive dominion and control).

[45] Ashford v. State, 583 So. 2d 1279, 1282 (Miss. 1991) (jury cannot find defendant guilty beyond reasonable doubt where prosecution's only eyewitness gives highly inaccurate description of defendant and other evidence is lacking).

[46] Willie v. State, 585 So. 2d 660, 666 (Miss. 1991) (where suspect has not asserted Fifth Amendment right to counsel, appointment of counsel to protect Sixth Amendment rights does not preclude interrogation on unrelated offenses).

[47] Veal v. State, 585 So. 2d 693, 697-98 (Miss. 1991) (confession considered voluntary and therefore admissible where accused possesses sufficient mental capacity to understand his rights and knows consequences of making confession after being informed of his rights).

[48] Cox v. State, 586 So. 2d 761, 765-68 (Miss. 1991) (evidence of conviction in another state inadmissible where record of conviction not properly authenticated under MISS. R. EVID. 901 and 902).

[49] Davis v. State, 586 So. 2d 817, 820-21 (Miss. 1991) (defendant may be convicted of receiving stolen goods over which he never exercised dominion and control where he aids and abets others in disposition of those goods).

[50] Johns v. State, 592 So. 2d 86, 89-91 (Miss. 1991) (error in admitting testimony that accomplice had been convicted of same crime for which defendant was standing trial could be addressed on appeal even without contemporaneous objection by defendant's lawyer).

[51] McCaine v. State, 591 So. 2d 833, 835-37 (Miss. 1991) (trial court must either instruct jury to disregard evidence or grant new trial where evidence presented to jury has not been made available to defendant in violation of UNIF. CRIM. R. CIR. CT. PRAC. 4.06); Dotson v. State, 593 So. 2d 7 (Miss. 1991) (under UNIF. CRIM. R. CIR. CT. PRAC. 4.06(a)(5) prosecution must disclose to defense relevant physical evidence).

The Mississippi Supreme Court considered the admissibility of hearsay statements made by a molested child to a teacher in *Griffith v. State*.[54] The court held the statements inadmissible under Rules 803(2) and (3) of the Mississippi Rules of Evidence because the testimony did not show when the victim made the statements to the teacher.[55] The court also remarked that opinion testimony about the child's veracity should not be admitted.[56] The court then instructed the trial court on remand to carry out the provisions of Rules 617 and 804(a)(6) of the Mississippi Rules of Evidence regarding the testimony of a molested child if the testimony in question at the first trial should be found not to meet the requirements of Rules 803(2) and (3).[57]

In *Heidelberg v. State*,[58] the court held that a defendant could not raise on appeal the question of the "chilling effect" of a ruling by the trial court without having made a record of what testimony the defendant would have given.[59] The court dis-

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[52] Bosarge v. State, WL 285760 (Miss.) (predisposition to commit crime may be proven by circumstantial evidence and is question for jury).

[53] Butler v. State, 592 So. 2d 983, 985 (Miss. 1991) (MISS. R. EVID. 901(a) does not require chain of custody to be proven where there are facts sufficient to support finding that physical evidence is what it purports to be).

[54] 584 So. 2d 383 (Miss. 1991).

[55] *Griffith*, 584 So. 2d at 386. The record did not contain testimony to support a finding that the statements were made while the child "was under stress of excitement caused by the event" or that the statements reflected the child's "then existing state of mind, emotion, sensation, or physical condition." *Id.*

[56] *Id.* The teacher testified that the child, who was mentally deficient, "could not have told this story twice and almost word for word if she had not experienced it. That is the reason why I truly believe her." *Id.*

[57] *Id.* at 387. MISS. R. EVID. 804(a)(6) provides an exception to the hearsay rule by which a child-declarant will be considered unavailable where there is "the substantial likelihood that the emotional or psychological health of the witness would be substantially impaired if the child had to testify in the physical presence of the accused." *Id.* MISS. R. EVID. 617 allows a child who has been sexually assaulted to testify by means of closed-circuit television where the court finds "a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify in open court and, in the case of a criminal prosecution, if compelled to testify in the presence of the accused." *Id.*

[58] 584 So. 2d 393 (Miss. 1991).

[59] *Heidelberg*, 584 So. 2d at 395. The trial court ruled evidence of the defendant's prior conviction of grand larceny admissible for impeachment at defendant's trial on a charge of burglary, and the defendant then chose not to testify. *Id.* The court noted that the defendant "must preserve for the record substantial and detailed evidence of the

missed as harmless error the trial court's refusal to allow defense counsel in closing argument to use a chart showing the various standards of proof.[60]

Two cases before the court in 1991 turned on the admissibility of a defendant's convictions of past crimes. In *Pugh v. State*,[61] the court held that evidence of a defendant's prior convictions could be admitted to impeach him only if the prosecution first made a prima facie showing of the probative value of those convictions.[62] However, the court held the evidence inadmissible because the trial court failed properly to balance the probative value of the prior convictions against the prejudicial effect of allowing them in.[63] In *Jordan v. State*[64] the trial court had denied the defendant's motion in limine to exclude a former conviction of rape at defendant's trial for armed robbery.[65] The court held the probative value of the conviction was outweighed by the prejudice to the defendant in admitting it and ordered a new trial.[66]

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testimony he would have given" to have grounds for appellate review. *Id.* (citing Saucier v. State, 562 So. 2d 1238, 1245 (Miss. 1990)).

[60] *Id.* at 395-96. From top to bottom the chart read "Beyond a Reasonable Doubt," "Clear and Convincing," "Preponderance of the Evidence," "Probability," "Possibility," "Maybe," "Could Be," and "Not Probable." *Id.* at 396. To the right of every phrase except "Beyond a Reasonable Doubt" were the words "Not Guilty." *Id.* The court held the trial court's action an abuse of its discretion but found the error harmless in light of the whole record. *Id.*

[61] 584 So. 2d 781 (Miss. 1991).

[62] *Pugh*, 584 So. 2d at 782-85. The trial court admitted evidence of the defendant's two prior convictions of burglary at his trial for burglary. *Id.* at 782. The court held that the State "arguably" met its prima facie burden of showing relevance to the defendant's credibility after the defendant testified on direct examination that he "wouldn't break in a house with the lights on" and then testified on cross-examination that he would never break into a house. *Id.* at 785.

[63] *Id.* The court set out five factors to be weighed in making this determination on the record: (1) the impeachment value of the prior crimes; (2) the point in time of conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue (citing Peterson v. State, 518 So. 2d 632, 636 (Miss. 1987)). *Id.*

[64] 592 So. 2d 522 (Miss. 1991).

[65] *Jordan*, 592 So. 2d at 523. The rape conviction was nine years old at the time of the trial. *Id.*

[66] *Id.* at 523-24. Applying the five-part balancing test of *Peterson*, the court noted specifically that a conviction of rape does not bear on a witness' credibility, that the charges were similar in the former case (rape accompanied by robbery), and that the

The court considered the admissibility of hearsay under the "excited utterance" exception embodied in Rule 803(2) of the Mississippi Rules of Evidence in *Sanders v. State*.[67] The court held that while the fact that a witness asked a question of the declarant was relevant on the question of spontaneity,[68] that fact alone did not conclusively demonstrate a lack of spontaneity on the part of the declarant.[69]

The court handed down two decisions in 1991 concerning evidence about acts of or threats by the victim in homicide cases. In *Heidel v. State*,[70] the court held evidence of the victim's propensity for violence to be admissible in a prosecution for culpable homicide.[71] The court held that specific instances of the victim's conduct could come in to establish the accused's claim of self-defense under Rule 405(b) of the Mississippi Rules of Evidence.[72] In *Day v. State*,[73] the court held evidence of threats towards the accused by the victim admissible even though the defendant did not plead self-defense.[74] In holding

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defendant, who chose not to testify when the motion was denied, was one of only two witnesses who could have established his alibi. *Id.* at 523. The court concluded that the requirements of Miss. R. Evid. 609(a) and (b) had not been met. *Id.*

[67] 586 So. 2d 792 (Miss. 1991).

[68] *Sanders*, 586 So. 2d at 795. MISS. R. EVID. 803(2) permits a "statement relating to a startling event . . . made while the declarant was under the stress of excitement caused by the event" to be admitted into evidence. *Sanders*, 586 So. 2d at 795. The declarant, who had been sexually assaulted, approached a police officer, who saw that she was very agitated and asked her "What happened?" *Id.* at 794-95.

[69] *Id.* at 795. The court pointed to evidence showing that only a short period of time had elapsed between the assault and the statements, and that the victim appeared "extremely upset." *Id.* at 795-96.

[70] 587 So. 2d 835 (Miss. 1991).

[71] *Heidel*, 587 So. 2d at 846-47. The defendant, who was on trial for killing his wife, was indicted for murder and convicted of manslaughter. *Id.* at 836. The defendant sought to have testimony admitted to show that his wife threatened him with a butcher knife about two weeks before her death. *Id.* at 843-44.

[72] *Id.* at 846. MISS. R. EVID. 405(b) allows evidence of specific instances of conduct to come in where "character or a trait of character of a person is an essential element of a . . . defense." *Heidel*, 587 So. 2d at 846. The court held that the threats were admissible on direct examination to show the defendant's state of mind at the time of the killing. *Id.* at 845-46.

[73] 589 So. 2d 637 (Miss. 1991).

[74] *Day*, 589 So. 2d at 644. The defendant shot the victim in the back a few minutes after an altercation between them, in which the victim threatened the defendant. *Id.* at 638. The defendant's proffered testimony, and the proffered testimony of two witnesses, was to the effect that a few months before the killing the victim had threatened to slash

the evidence admissible, the court declared that the pattern of threats was probative of the defendant's state of mind at the time of the killing.[75]

Among the several cases dealing with constructive possession[76] was *Newell v. State*.[77] The defendant in *Newell* was convicted of possession of thirty-one pounds of marijuana.[78] The contraband was found in a shed near, but not on, the defendant's property, and there was no direct or physical evidence to connect it with the defendant.[79] The court held the evidence insufficient to establish the defendant's dominion or control over the marijuana.[80]

Longstreet v. State[81] dealt with the admissibility of results of a blood-alcohol test. The defendant consented to having a blood sample drawn after his car collided with another car and killed three people.[82] On appeal, the defendant argued that the taking of the sample was unconstitutional because he was not told of his right to withhold his consent.[83] The court found suffi-

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his face with a razor. *Id.* at 639-40.

[75] *Id.* at 641. The court predicated admissibility on Miss. R. Evid. 404(b), which allows evidence about "other crimes, wrongs or acts . . . [to] be admissible for . . . proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Day*, 589 So. 2d at 641. The court noted that a jury's verdict of murder, manslaughter, or self-defense would turn upon the accused's state of mind. *Id.* at 642.

[76] *See supra* note 7 and accompanying text.

[77] 590 So. 2d 1386 (Miss. 1991).

[78] *Newell*, 590 So. 2d at 1387-88. The defendant's conviction of selling marijuana was upheld. *Id.* at 1387.

[79] *Id.* at 1388-90. The shed was across the road from the defendant's house and was obscured from view by thick foliage. *Id.* at 1388. A confidential informant for the Mississippi Bureau of Narcotics, who visited the defendant's house to buy marijuana, testified that the defendant told him he had a hundred pounds of marijuana to sell. *Id.* at 1387. The informant then saw the defendant walk toward the road; when the defendant returned from the road, he sold the informant a pound of marijuana. *Id.* at 1387-88.

[80] *Id.* at 1389-1390. The court cited Pool v. State, 483 So. 2d 331, 336 (Miss. 1986), where it held that when "the premises upon which contraband is found is not in the exclusive possession of the accused, the accused is entitled to acquittal, absent some competent evidence connecting him with the contraband." *Newell*, 590 So. 2d at 1388.

[81] 592 So. 2d 16 (Miss. 1991).

[82] *Longstreet*, 592 So. 2d at 16. The defendant was found guilty of three counts of manslaughter. *Id.* The test revealed a concentration of alcohol in the defendant's blood of 0.13 percent at least an hour and a half after the collision. *Id.* at 17.

[83] *Id.* at 18. The state trooper who investigated the accident asked for the defendant's consent at the hospital, and defendant signed a consent form. *Id.*

cient evidence of a knowledgeable waiver of the right to refuse consent by looking to the totality of the circumstances.[84]

The Mississippi Supreme Court addressed the effect of illegal arrest and delay in providing an initial appearance on the admissibility of a confession in *Coleman v. State*.[85] The defendant, who was subsequently found guilty of rape, burglary, and kidnapping, was arrested for carrying a concealed weapon after police stopped the car he was in and searched him without first having probable cause to arrest him.[86] After being arrested, the defendant was kept in jail for twelve days without being taken before a magistrate.[87] The court held the confession inadmissible, finding that the detention on the misdemeanor charge was a mere pretext for gathering evidence and interrogating the victim about the rape.[88]

IV. JURY INSTRUCTIONS AND OTHER JURY ISSUES

A. *Jury Selection*

During 1991, the Mississippi Supreme Court decided cases concerning juror substitution,[89] the failure of a juror to disclose a relationship to the victim,[90] and when a juror may be struck for cause.[91] The court also decided several cases dealing with the racial composition of juries.

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[84] *Id.* at 19-20. The court cited as controlling Ashley v. State, 423 So. 2d 1311, 1313-14 (Miss. 1983), where it was held that the State may use the results of blood-alcohol tests when the state has reasonable grounds to ask for a blood sample. *Id.* The court pointed to testimony that the defendant had been driving erratically; that the highway was straight, level, and dry; that defendant was travelling in the wrong lane of traffic when the accident took place; that the state trooper saw a beer can in the defendant's car; and that defendant's speech was slurred and his pupils dilated. *Id.* at 21.

[85] 592 So. 2d 517 (Miss. 1991).

[86] *Coleman*, 592 So. 2d at 519. The police likewise lacked probable cause to stop the car in which the defendant was riding. *Id.* The search uncovered a knife on the defendant's person. *Id.*

[87] *Id.* While defendant was in jail, police took samples of his blood, hair, and spit. *Id.* at 518. Upon being told that things "didn't look too good" for him, the defendant confessed to the rape and other crimes of which he was convicted. *Id.*

[88] *Id.* at 521. The court held that MISS. R. EVID. 1.04, which requires a first hearing without unreasonable delay, was clearly violated. *Id.*

[89] Folk v. State, 576 So. 2d 1243 (Miss. 1991) (alternate juror cannot replace excluded juror after jury has begun deliberations).

[90] Lewis v. State, 580 So. 2d 1279 (Miss. 1991) (new trial not warranted simply because prospective juror did not disclose relationship with person who cohabited with victim).

In *Harris v. State*,[92] the appellant asserted that blacks had been systematically excluded from the jury.[93] The court, citing *Taylor v. Louisiana*, 419 U.S. 522 (1975), noted that pools of names for perspective jurors may not exclude distinctive groups; however, there is no requirement that the pool of names mirror the community.[94] The Mississippi Supreme Court held that a method of jury selection based upon voter registration lists without regard to race, does not exclude blacks.[95]

In *Bush v. State*,[96] the appellant alleged that the State used its peremptory challenges to exclude blacks from the jury.[97] The recent United States Supreme Court decision in *Powers v. Ohio*, 111 S. Ct. 1364 (1991), held that the equal protection clause of the United States Constitution prohibits a prosecutor from using peremptory challenges to exclude blacks.[98] In light of this decision, the Mississippi Supreme Court remanded the case for the State to explain its peremptory challenges to black juries.[99] If it appears the jurors were dismissed because of their race, a new trial is in order.[100]

In *Govan v. State*,[101] the appellant asserted that the exclusion of black jurors who knew him was not racially neutral.[102] The Mississippi Supreme Court held that the appellant had not presented facts and circumstances which would justify an inference that the jurors were excluded only because they were black.[103]

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[91] Martin v. State, 592 So. 2d 987, 988 (Miss. 1991) (views of juror not enough to constitute grounds for challenge, but instead there must be clear showing that prospective juror would be unable to follow court's instructions).

[92] 576 So. 2d 1262 (Miss. 1991).

[93] *Harris*, 576 So. 2d at 1264. Harris noted that 37% of his county was black. *Id.*

[94] *Id.* The court stated that a jury pool did not have to reflect various distinctive groups in the population. *Id.* (citing *Taylor*, 419 U.S. at 538).

[95] *Harris*, 576 So. 2d at 1264. The court also held that a prima facie case of discrimination in the use of peremptory challenges at the trial level could not be raised because it was not first raised at the trial. *Id.* at 1265.

[96] 585 So. 2d 1262 (Miss 1991).

[97] *Bush*, 585 So. 2d at 1265.

[98] *Id.* at 1267. The court stated qualified and unbiased jurors should not be eliminated simply because of their race. *Id.* (citing *Powers*, 111 S. Ct. at 1370).

[99] *Bush*, 585 So. 2d at 1268.

[100] *Id.* If no finding of discrimination is made, the cause should then be certified. *Id.*

[101] 591 So. 2d 428 (Miss. 1991).

[102] *Govan*, 591 So. 2d at 429. Appellant asserted that all his acquantances in this county were black, and he worked in a different county. *Id.* n.1.

V. MISCELLANEOUS

During 1991 the Mississippi Supreme Court decided several cases dealing with various issues. Among these were the required sufficiency of a search warrant,[104] meritorious earned time for prison inmates,[105] enhanced sentencing after trial *de novo*,[106] acquital for entrapment,[107] and harmless error.[108]

In *Morris v. State*,[109] appellant was convicted of touching a child for lustful purposes and for two counts of sexual battery.[110] The vicim testified that the appellant molested her during 1982-1984 and again in 1986.[111] Appellant asserted that the statute of limitations barred this prosecution; however, the Mississippi Supreme Court stated that the statute of limitations should be interpreted in favor of the innocent victim.[112] The court held that when a small child is threatened with harm to himself or his family for telling of his abuse, the running of the statute is tolled until the child is removed from the threatening environment.[113]

In *Robinson v. State*,[114] appellant pled guilty to possession of marijuana and received a suspended sentence.[115] Within three days appellant was arrested on similar charges; the judge set aside the first sentence and sentenced appellant to three years in prison.[116] Appellant asserted that the second sentence was invalid because it imposed a greater punishment than the first.[117] The Mississippi Supreme Court held the second sentence was of no consequence because the trial court should not have suspended the first sentence because appellant had previously been convicted of a felony.[118]

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[103] *Id.* at 431.

[104] Williams v. State, 583 So. 2d 620 (Miss. 1991) (search warrant sufficient if places and things to be searched are designated so that officer may locate them with reasonable certainty).

[105] Ross v. State, 485 So. 2d 777 (Miss. 1991) (correctional officials have discretionary power to award meritorious earned time).

[106] Fisher v. City of Eupora, 587 So. 2d 878 (Miss. 1991) (after finding of guilt following trial *de novo*, court may impose enhanced sentence).

[107] Pulliam v. State, 592 So. 2d 24 (Miss. 1991) (when defense is entrapment, substantial showing must be made of defendant's predisiposition).

[108] Hansen v. State, 592 So. 2d 114 (Miss. 1991) (when statement of non-testifying accomplice is offered against defendant, no reversal if error is harmless).

[109] No. 07-KA-58857 (Miss. 1991).

[110] *Morris*, No. 07-KA-58857, slip op. at 1.

[111] *Id.* The victim was the appellant's step-daughter. *Id.*

[112] *Id.*, slip op. at 9.

[113] *Id.* The appellant had threatened to kill his step-daughter's father if she reported his conduct. *Id.*

[114] 585 So. 2d 757 (Miss. 1991).

VI. Post-Conviction Relief

The Mississippi Supreme Court decided a number of cases involving post-conviction relief proceedings some of which dealt with: the form and sufficiency of the petition required in the application process to the court for permission to file for post-conviction relief,[119] the reinstatement of parole as it relates to post-conviction collateral relief,[120] the level of proof or evidence necessary to enable the court to grant an evidentiary hearing for an out-of-time appeal,[121] the basis of denial of defendant's motion for post-conviction relief,[122] the sufficiency of the evidence in the lower court's record in determining whether post-conviction relief will be granted,[123] the duty of an attorney to perfect an appeal for post-conviction relief,[124] and the denial of the defendant's second motion for post-conviction relief for failure to appeal from denial of first motion.[125]

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[115] *Robinson*, 585 So. 2d at 758.

[116] *Id.*

[117] *Id.* Appellant also asserted that the original sentence was a final judgment. *Id.* The court held this without merit because the second sentence was imposed during the same court term as the first. *Id.*

[118] *Id.* at 759.

[119] Turner v. State, 590 So. 2d 871 (Miss. 1991) (post-conviction collateral relief petition which meets basic pleading requirements is sufficient to mandate evidentiary hearing unless it appears beyond doubt from facts and circumstances that petitioner can prove no set of facts in support of his claim which would entitle him to relief); Ragland v. State, 586 So. 2d 170 (Miss. 1991) (when petition for post-conviction relief is filed by prisoner and petition meets requirements of Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-1 to 29 (Supp. 1990), court should hold hearing to consider petition); Williams v. State, 585 So. 2d 761 (Miss. 1991) (where petition for post-conviction collateral relief does not on its face indicate that petitioner is entitled to no relief, the petitioner is entitled to proceed past pleading stage because complaint can be dismissed on its face only if it plainly appears that moving party is not entitled to any relief pursuant to Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-11 (2) (Supp. 1990)); Myers v. State, 583 So. 2d 174 (Miss. 1991) (prisoner's petition for post-conviction relief must contain statement of grounds on which relief is sought, separate statement of facts, and affidavits of any witnesses who will testify pursuant to Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-9 (1) (Supp. 1990)).

[120] Moore v. State, 587 So. 2d 1193 (Miss. 1991) (where post-conviction relief petition for reinstatement of parole is filed by prisoner, and evidentiary hearing is held, lower court record of hearing must contain grounds for lower court's determination).

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[121] Harris v. State, 578 So. 2d 617 (Miss. 1991) (where criminal defendant files motion for out-of-time appeal due to his counsel's failure to perfect or advise defendant of his right to appeal, and contradictory affidavits dispute essential facts of defendant's claim, defendant is entitled to evidentiary hearing on merits of such claim); Wright v. State, 577 So. 2d 387 (Miss. 1991) (in situation where opposing parties present contradictory affidavits and evidence disputing material fact in issue which is not disputed by unimpeachable evidence, lower court errs in not granting evidentiary hearing pursuant to Mississippi Uniform Post-Conviction Relief Act for out-of-time appeal pursuant to MISS. CODE ANN. §§ 99-39-1 *et. seq.* (Supp. 1991)).

[122] Harrell v. State, 583 So. 2d 963 (Miss. 1991) (to preserve motion for directed verdict for appeal purposes, defense must make motion at conclusion of its own evidence); Evans v. State, 579 So. 2d 1246 (Miss. 1991) (where record from trial court contains sufficient evidence to prove defendant's guilt beyond reasonable doubt, defendant's motions for directed verdict and JNOV should not be granted).

[123] Stephens v. State, No. 89-KA-0578 (Miss. Dec. 31, 1991) (court determined that where defendant failed to demonstrate any prejudice or detrimental effect on his case by certain acts, such as arrest of defense witness prior to completion of trial or lower court's refusal to grant defendant's lesser included offense instruction, reversible error will not be granted); Roberts v. State, 582 So. 2d 739 (Miss. 1991) (court stated that new trial should not be granted unless lower court is convinced that verdict is so contrary to weight of evidence that to allow it to stand would be to sanction unconscionable injustice); Campbell v. State, 580 So. 2d 1312 (Miss. 1991) (court explained that in order for conviction and sentence from lower court to be upheld, evidence must be such that juror could rationally conclude that accused had committed crime); Gibson v. State, 580 So. 2d 739 (Miss. 1991) (court noted that where evidence adduced at trial against defendant is legally sufficient and lower court acted within its discretion in overruling defendant's motion for new trial, appellate court does not have authority to set aside or disturb defendant's conviction). *See also* Haynes v. State, 584 So. 2d 432 (Miss. 1991) (despite court reporter's unreasonable delay in preparing record of lower court, court found no merit to defendant's assignment of error for this malfeasance).

[124] Minnifield v. State, 585 So. 2d 723 (Miss. 1991) (where relative of client directs attorney to initiate appeal from criminal conviction, attorney is under duty to perfect appeal).

[125] Grubb v. State, 584 So. 2d 786 (Miss. 1991) (trial court properly denied, as successive writ, defendant's second motion for post-conviction relief, where defendant had fair opportunity to present his post-conviction claim to state forum and did so in his first motion to vacate and no appeal was taken from denial of order).

In *Wilson v. State*,[126] the court found that where the plea proceeding record is inadequate to show evidence of a violation of defendant's constitutional rights, the lower court errs in denying an evidentiary hearing based on defendant's Motion for Post Conviction Collateral Relief.[127] Further, the court noted that no matter how inartfully a defendant's motion may be drafted, if it alleges constitutional violations combined with an inadequate plea proceeding record, an evidentiary hearing for determination of those issues is warranted.[128]

In *Milam v. State*,[129] the court found that a prisoner becomes eligible for parole once he has served "one-fourth (¼) of the total of such term or terms for which the prisoner was sentenced. . . ."[130] However, the court explained that persons convicted of armed robbery are automatically ineligible for parole until they have served at least the first ten years of any sentence imposed.[131] The court stated further the defendant's claim that he was denied substantial credits earned under the good time program "runs up against a legal brick wall" in the form of section 47-5-139(7) of the Mississippi Code, which provides that "no inmate in any event shall have his sentence terminated by administrative good time action until he is eligible for parole."[132]

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[126] 577 So. 2d 394 (Miss. 1991).

[127] *Wilson*, 577 So. 2d at 396-97. The appellant, Charles Wilson, entered a plea of guilty as evidenced by his Petition To Enter A Plea of Guilty, to the charges of armed robbery and aggravated assault, and was sentenced to 15 years imprisonment. *Id.* at 395-96. After the sentence was handed down, Wilson filed a petition for Post-Conviction Collateral Relief/Motion to Vacate Judgment and Conviction and claimed that his plea was not voluntarily made and that he was denied effective assistance of counsel. *Id.* at 396.

[128] *Id.* at 397-98.

[129] 578 So. 2d 272 (Miss. 1991).

[130] *Milam*, 578 So. 2d at 273 (citing MISS. CODE ANN. § 47-7-31-(1) (Supp. 1990)). The appellant, Lavern Milam, pled guilty to separate charges of armed robbery and manslaughter and was sentenced to 10 years imprisonment on the armed robery charge and 15 years on the manslaughter charge. *Id.* at 273-74. Milam filed for post-conviction relief charging that the Department of Corrections was in error in advising him that his initial parole date was April 6, 1993, because such calculation did not allow him credit for "good time" that he had earned over the time period he had been incarcerated. *Id.* at 273. Milam presented a claim based on the Mississippi Uniform Post-Conviction Collateral Act, MISS. CODE ANN. § 99-39-5 (1) (d) (Supp. 1990), alleging such error, and the circuit court dismissed Milam's complaint. *Id.*

[131] *Id.* at 273-74 (citing MISS. CODE ANN. § 47-7-3 (1) (d) (Supp. 1990)).

[132] *Milam*, 578 So. 2d at 274. Additonally, the court cited MISS. CODE ANN. § 47-7-3

In *Heidelberg v. State*,[133] the court found that Heidelberg had not properly preserved the issue that his testimony was critical to his defense because the evidence was not documented in the court record.[134] The court explained that a defendant, who wished to preserve for appeal purposes the point that a trial judge's ruling had a "chilling effect" on the defendant's testimony, had to preserve in the court record "substantial and detailed evidence of the testimony he would have given so that [the court] may gauge its importance to his defense."[135]

In *Smallwood v. State*,[136] the court considered whether in an indictment for perjury, it is sufficient to charge generally that the material sworn to in the false oath was material to the issue *or point of inquiry*.[137] The court noted that the most pertinent problem facing the court in this decision was the lack of preservation of a transcript from the grand jury session. The court also reasoned that perjury requires stringent proof of a direct and compelling character.[138] The court held that in order to convict for perjury the State is required to prove the falsity of the accused's statement by a minimum of two witnesses, or by one witness and corroborating circumstances.[139]

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(2) (Supp. 1990) in emphasizing that nothing would have reduced the 10 years Milam was sentenced to serve for the crime of armed robbery. *Id.*

[133] 584 So. 2d 393 (Miss. 1991).

[134] *Heidelberg*, 584 So. 2d at 395. The appellant, Luther Heidelberg, Jr., was convicted of burglary of a building other than a dwelling and was sentenced to 7 years. *Id.* at 394. Heidelberg appealed contending that the trial judge's ruling which would have permitted use of Heidelberg's prior conviction for impeachment purposes was erroneous due to its highly prejudicial value. *Id.*

[135] *Id.* at 395 (citing Saucier v. State, 562 So. 2d 1238 (Miss. 1990)). Accordingly, the court found that they were unable to gauge the importance of the testimony to his alibi defense. *Id.*

[136] 584 So. 2d 733 (Miss. 1991).

[137] *Smallwood*, 584 So. 2d at 737-38. The appellant, Raymond Smallwood, was indicted by the grand jury of DeSoto County for perjury and conspiracy to commit perjury and was subsequently convicted on both counts. *Id.* at 735. The appellant made several assignments of error among which included an argument that the indictment failed to allege that the words which constituted the alleged perjury were material to any issue of the grand jury proceedings, and also that the indictment failed to state facts clearly showing their materiality. *Id.* at 737.

[138] *Id.* at 742 (citing McFee v. State, 510 So. 2d 790, 792-3 (Miss. 1987)).

[139] *Id.* at 740-41.

In *Horton v. State*,[140] the court held that a defendant must be informed of his constitutional right for protection against self-incrimination prior to a court adjudication that a guilty plea was intelligently and voluntarily given.[141] The court stated that in order to determine whether the defendant was advised or informed of his constitutional rights against self-incrimination, the defendant should be afforded the right to an evidentiary hearing for the opportunity to prove his claim.[142]

In *Tobias v. State*,[143] the court found that perjured testimony is grounds for a new trial only where (1) the prisoner clearly proves that the testimony was perjured; (2) the perjury was discovered after trial and could not have been discovered before the trial with the exercise of due diligence; (3) the perjured testimony was material; and (4) a substantial likelihood exists that a new trial, in the absence of the perjury, would reach a different result.[144]

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[140] 584 So. 2d 764 (Miss. 1991).

[141] *Horton*, 584 So. 2d 767-68 (citing Boykin v. Alabama, 395 U.S. 238 (1969)). The appellant, Bobby Daniel Horton, Jr., entered a plea of guilty to receiving stolen property and was sentenced to serve 5 years. *Id.* Horton filed a post-conviction collateral relief petition claiming that his plea of guilty was involuntarily and unintelligently made based on the trial judge's failure to advise him of his right against self-incrimination and based on an ineffective assistance of counsel claim which stemmed from counsel's failure to advise him of other defenses available to him. *Id.* at 765.

[142] *Id.* at 767-68. The court stated that the statement on the information on the petition was not enough to show that the defendant was advised or informed of his consittutional rights against self-incrimination. *Id.* at 767. *See also* McCreary v. State, 582 So. 2d 425 (Miss. 1991) (rape defendant was entitled to hearing on his motion for post-conviction relief allegation that guilty plea was not knowingly and voluntarily made). *Cf.* Wright v. State, 577 So. 2d 387 (Miss. 1991) (evidentiary hearing was required in post-conviction proceeding to determine whether defendant's attorney failed to inform him of his right to appeal).

[143] 584 So. 2d 1276 (Miss. 1991).

[144] *Tobias*, 584 So. 2d at 1278. The appellant, William Tobias, was convicted of burglary and sentenced as an habitual offender to 10 years in prison without probation or parole. *Id.* at 1277. The conviction of Tobias was based in a large part on the testimony of his accomplice Gary Perryman. *Id.* Tobias filed a motion for post-conviction relief claiming that Perryman's testimony against Tobias was false. *Id.* Tobias was afforded an evidentiary hearing in order to prove his claims in a post-conviction proceeding, but was denied post-conviction relief. *Id.* at 1278. The court found that Tobias' petition had merit and that the trial judge neither made findings of fact in the record nor a statement of the law as it applied to the facts in reaching a decision, and that the grounds for a claim of perjured testimony were satisfied. *Id.* at 1279.

In *Moore v. State*,[145] the court considered whether to grant a prisoner's writ of habeas corpus which alleged an unlawful revocation of a suspended sentence during probation, and found that because the term "probation" denotes a release of a defendant/prisoner, under a supervised sentence, into the community under the supervision of a probation officer, a prisoner will not be permitted to serve his period of probation simultaneously with his incarceration.[146] Furthermore, the court noted that due to a subsequent offense committed by the defendant during the period of probation, the revocation of the suspended sentence was warranted.[147]

VII. SPECIFIC STATUTES

The Mississippi Supreme Court in 1991 rendered several decisions dealing with specific offenses, statutes and court rules, including the following: the requisite elements of possession of a controlled substance with intent to distribute,[148] a judge's authority to sentence a defendant to life imprisonment where the statute requires the jury to fix such a sentence,[149] the mandates of Mississippi's speedy trial statute,[150] the vicarious disqualification of a district attorney's office for conflict of interest,[151] the constitutionality of the statutory maximum on attorney's fees for representation of an indigent defendant,[152] the scope of Rule 4.07 of the Uniform Criminal Rules of Circuit Court Practice,[153] and whether a prisoner's discharge is mandatory or permissive under the federal extradition statute where the agent of the demanding state fails to appear within the prescribed period.[154]

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[145] 585 So. 2d 738 (Miss. 1991).

[146] *Moore*, 585 So. 2d at 741. The appellant, Albert Moore, was denied a motion for writ of habeas corpus. *Id.* at 740. Moore contended that his 15 year suspended sentence was unlawfully revoked. *Id.* The court noted that due to a subsequent offense committed by the defendant during the period of probation, the revocation of the suspended sentence was warranted. *Id.* at 740-41.

[147] *Id.* at 740-41.

[148] Stringfield v. State, 588 So. 2d 438, 440-41 (Miss. 1991) (defendant may not be convicted of possession of controlled substance with intent to distribute under § 41-29-139 in absence of evidentiary facts on which jury could base their verdict; surmise and suspicion are not enough); Hicks v. State, 580 So. 2d 1302, 1306 (Miss. 1991) (charge of possession of controlled substance with intent to distribute under § 41-29-139 contains within it lesser included offense of possession).

[149] Luckett v. State, 582 So. 2d 428, 430 (Miss. 1991) (defendant convicted under MISS. CODE ANN. § 97-3-65(2) may not be sentenced to life imprisonment unless jury fixes penalty at life imprisonment).

[150] *See infra* notes 43-49 and accompanying text.

[151] Aldridge v. State, 583 So. 2d 203, 205 (Miss. 1991) (where assistant district attorney has previously represented defendant in same judicial district, state must show that assistant district attorney had absoutely no participation in the case, from time of withdrawal through adjudication; divulged no confidential information; and notified defend-

In the cases involving a defendant's Sixth Amendment right to a speedy trial, the court also addressed Mississippi's speedy trial statute.[155] In the case of *Adams v. State*,[156] the court explained the rules for calculating the 270-day statutory period. Unlike the traditional Sixth Amendment analysis, the statutory right to a speedy trial attaches and time begins running after the accused has been arraigned.[157] In calculating the statutory period, the date of the arraignment is not included, but the date of the trial is, as are weekends, unless the last day of the statutory period falls on a Sunday.[158] Where the State has demonstrated good cause and a continuance is granted, the time elapsed during the period of continuance is not counted.[159] In addition, any

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ant promptly upon becoming aware of conflict of interest).

[152] Mease v. State, 583 So. 2d 1283, 1284 (Miss. 1991) (citing Pruett v. State, 574 So. 2d 1342 (Miss. 1990), and Wilson v. State, 574 So. 2d 1338 (Miss. 1990) (court summarily upheld statutory maximum for attorney's fees)).

[153] Deal v. State, 589 So. 2d 1257, 1259 (Miss. 1991) (requirement of Uniform Criminal Rules of Circuit Court Rule 4.07 that prosecutor provide defendant with names of rebuttal witnesses applies only where prosecutor requests notice of alibi).

[154] Godsey v. Houston, 584 So. 2d 389, 391 (Miss. 1991) (federal extradition statute at 18 U.S.C. § 3182 does not mandate discharge if agent of demanding state fails to appear within thirty days of arrest).

[155] MISS. CODE ANN. § 99-17-1 (Supp. 1991) provides: "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." *Id.* In Wiley v. State, 582 So. 2d 1008 (Miss. 1991), the court held that compliance with § 99-17-1 does not necessarily mean that a defendant's federal and state constitutional right has been respected. *Wiley*, 582 So. 2d at 1011.

[156] 583 So. 2d 165 (Miss. 1991).

[157] *Adams*, 583 So. 2d at 167.

[158] *Id.*

[159] *Id.* In Corley v. State, 584 So. 2d 769 (Miss. 1991), the court held that where, due to an administrative error, a continuance is granted for a charge which was dropped instead of the charge that was ultimately prosecuted, the time elapsed during the continuance is nevertheless deducted from the total period when calculating the 270-day statutory period. *Corley*, 584 So. 2d at 771. However, in Flores v. State, 586 So. 2d 811 (Miss. 1991), the court held that time expended while a co-defendant sought a continuace as a

continuances granted to the defendant also tolls the running of the statutory period.[160]

Applying the foregoing rules to the instant case, the court in *Adams* held that a congested docket may give rise to good cause for a continuance.[161] As such, the court held that the time elapsed during the continuance was not counted against the State, and the defendant was therefore tried within the statutory period.[162]

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result of the State's failure to comply with discovery would be charged against the State. *Flores*, 586 So. 2d at 813.

[160] *Adams*, 583 So. 2d at 167. In *Ford v. State*, 589 So. 2d 1261 (Miss. 1991), the court held that the days when the defendant's motion to suppress was being considered were not counted against the State for purposes of computing the 270-day period. *Ford*, 589 So. 2d at 1262.

[161] *Adams*, 583 So. 2d at 167.

[162] *Id.*

MISCELLANEOUS

I. Family Law

A. *Child Custody*

In 1991, in *Schepens v. Schepens*,[1] the Mississippi Supreme Court held that where the best interest of the children would not be adversely affected by either parent receiving custody of the children, the lack of an opportunity to prepare for adverse non-family witnesses is grounds for vacating the judgment since it may affect the chancellor's decision.[2] In *Schepens*, the father, who was awarded custody of the children, did not answer the interrogatories covering four non-family witnesses until four days prior to the trial.[3] In overturning the denial of the wife's motion for a continuance, the Mississippi Supreme Court reasoned that since the interest of the children would not have been adversely affected by their custody being granted to either parent,[4] the wife's lack of an opportunity to prepare for the adverse witnesses could not have affected the chancellor's decision.[5]

The Mississippi Supreme Court also addressed several other cases involving child custody.[6]

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[1] 592 So. 2d 108 (Miss. 1991).

[2] *Schepens*, 592 So. 2d at 109. The trial court had denied Mrs. Schepens a two-week continuance in order to afford her the opportunity to depose the adverse witnesses. *Id.* at 108.

[3] *Id.* at 109. Two witnesses had refused to talk to the wife's attorney and had hung up the phone when he called. *Id.* Moreover, two of the witnesses were non-family members and their appearance was a surprise. *Id.*

[4] *Id.* The supreme court described the issue of custody as "extremely close." *Id.*

[5] *Id.* The supreme court stated the lack of an opportunity to prepare for the witnesses could have affected the evidence presented and, therefore, the chancellor's decision. *Id.* at 110.

[6] *See* Morrow v. Morrow, 592 So. 2d 829 (Miss. 1991) (providing that in child custody modification suits, movant must prove by preponderance of evidence material change in circumstances which adversely affects welfare of child and, if shown, that best interest of child requires change in custody); Polk v. Polk, 589 So. 2d 123 (Miss. 1991) (holding that where chancellor denies child his choice of custodial parent under MISS. CODE ANN. § 93-11-65 (Supp. 1990), then chancellor must make on-the-record findings as to why best interest of child is not served); Wood v. Wood, 579 So. 2d 1271 (Miss. 1991) (stating that failure to award presumptive right of regular overnight visitation to non-

B. Child Support

The Mississippi Supreme Court also ruled on several decisions concerning child support.[7] In *Lawrence v. Lawrence*,[8] the court addressed an agreement made part of the final divorce decree which only obligated the father to pay child support until the children reached eighteen or became self-supporting.[9] When the oldest Lawrence child left for college, the mother moved to modify the decree in an effort to increase and continue the support payments.[10] Relying on Section 93-5-2 of the Mississippi Code, the Mississippi Supreme Court held that the agreement was not enforceable because two parents may not contract to end child support payments before the child reaches twenty-one or becomes self-supporting.[11] The court also held that the effective date of a modification of child support payments should be the date the motion to modify is filed.[12]

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custodial parent constitutes reversible error absent evidence of detrimental effect to child).

[7] *See* Sorrell v. Borner, No. 90-CA-250 (Miss. Sept. 4, 1991) (providing that where parent is awarded custody and child support payments pursuant to modification of previous decree, child support payments may be held in abeyance until parent has fully paid arrearage of child support under previous decree); Adams v. Adams, 591 So. 2d 431 (Miss. 1991) (holding that child support payments vest when they become due and interest begins to run at time of vesting); Gregg v. Montgomery, 587 So. 2d 928 (Miss. 1991) (stating that where husband alleges he was unable to comply with divorce decree's mandate to pay certain amount of child support and alimony, he must demonstrate in particular instead of general terms that it was impossible for him to fully comply with decree); Smith v. Smith, 585 So. 2d 750 (Miss. 1991) (holding that award of child support will not be reversed unless chancellor was in manifest error or manifestly abused his discretion); Caldwell v. Caldwell, 579 So. 2d 543 (Miss. 1991) (providing that where parent does not comply with court order to pay his child's college expenses, parent cannot subsequently have child emancipated but must pay expenses for years child could have attended college but was unable to do so because of lack of funds).

[8] 574 So. 2d 1376 (Miss. 1991).

[9] *Lawrence*, 574 So. 2d at 1378. The Lawrences had two children. *Id.* at 1376.

[10] *Id.* at 1378. The changes for which the mother wanted an increase in support included the oldest child's college expenses, the younger child's need for special tutoring and increased clothing cost, and the father's increased in income. *Id.*

[11] *Id.* at 1381. In reaching this conclusion, the court followed the traditional reasoning that support benefits belong to the child and not the parent. *Id.*

[12] *Id.* at 1384. In reaching this holding, the court found that "the fears of dilatory conduct and self help would be better addressed by having the modification, or increase in support, begin at the time of the filing of the petition to modify." *Id.*

In *Varner v. Varner*,[13] the Mississippi Supreme Court addressed the issue of whether support payments made directly to the child, although different in kind, can be equitably credited to the obligated parent.[14] In *Varner*, the mother was awarded custody of the three children and $600 per month in child support.[15] Because of hardship, one child went to live with the father and the mother memorialized in writing a deduction of the support to $400.[16] Subsequently, another child moved in with the father, whereupon the payments were commensurately reduced to $200 per month.[17] When the remaining child enrolled in college that father ceased paying support directly to the mother and instead deposited $250 per month in the child's bank account.[18] Upon termination of this support, the mother sued for the arrearage for all the children and asked for a charge of civil contempt. The Mississippi Supreme Court denied all of her pleadings stating that when an obligated parent proves by a preponderance of the evidence that he has actually paid substantial support directly to the child, though different in kind than required by the decree, equity may allow a corresponding credit where the custodial parent would otherwise be unjustly enriched.[19] The court also provided that such credit may also serve as an adequate defense to a charge of civil contempt for failure to pay support.[20]

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[13] 588 So. 2d 428 (Miss. 1991).

[14] *Varner*, 588 So. 2d at 434-35. The commensurate issue was necessarily whether the non-obligated parent would be unjustly enriched by receiving the back support when the obligated parent had already provided support directly to the child. *Id.*

[15] *Id.* at 430. Dr. Varner was a veterinarian and his wife, Susie, was a beautician. *Id.* The Varners had three children all of whom were minors. *Id.*

[16] *Id.* at 431. The Varners middle child, Melinda, had behavioral and discipline problems during adolescence, especially at school. *Id.* The problems became so bad that the Varners decided to send Melinda away to boarding school, but before the school would admit Melinda, it asked that custody and responsibility of Melinda be given to Dr. Varner. *Id.* To effectuate the change of custody, Mrs. Varner wrote Dr. Varner a letter giving custody of Melinda to him and reducing his child. *Id.*

[17] *Id.* The Varner's eldest daughter, Michelle moved in with Dr. Varner after her mother placed her clothes in the driveway while Michelle was on a date. *Id.*

[18] *Id.* at 432. At no time was court approval sought for any of these changes in custody and support. *Id.*

[19] *Id.* at 434-35. The court also took notice of the fact that the mother had accepted this practice for nine years. *Id.*

[20] *Id.* The court noted that when a party makes an extra-judicial modification he

C. Alimony

In *Lewis v. Lewis*,[21] the Mississippi Supreme Court addressed the question of whether a final decree of divorce relieves a party from paying an arrearage of temporary alimony which accrued before the entry of that final decree.[22] The court rejected the "merger rule" which allows a temporary support order to merge into the final decree thereby rendering the support uncollectible since it rewards the recalcitrant husband for noncompliance with the court's order by excusing him from payment of arrears.[23]

Additionally in 1991, the Mississippi Supreme Court addressed other areas involving alimony.[24]

D. Divorce

In *Dudley v. Light*,[25] the Mississippi Supreme Court held that when an unsecured creditor makes a loan to a married couple for the purpose of saving the couple's jointly owned home from foreclosure, then in the event of divorce, the unsecured creditor is entitled to an equitable lien on the homestead since unjust enrichment would result if the couple were permitted to

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does so at his own peril, and the better practice is to seek court approval of the modification. *Id.*

[21] 586 So. 2d 740 (Miss. 1991).

[22] *Lewis*, 586 So. 2d at 741. Milton Lewis, the husband, agreed in a temporary order to pay his wife $550.00 per month. *Id.* Milton did not pay however, and after the final decree was entered, his ex-wife Minnie filed an action to recover the unpaid temporary alimony. *Id.* Milton answered by asserting that the property settlement agreement, incorporated into the final decree of divorce, had settled all rights and obligations between the parties. *Id.*

[23] *Id.* at 742. In rejecting the "merger rule," the court relied on the well-established rule that an obligation owed by one spouse to the other becomes fixed and vested when due and unpaid. *Id.*

[24] *See* Cunningham v. Lanier, 589 So. 2d 133 (Miss. 1991) (holding that in determining whether obligation is lump sum or periodic, court should look to substance of what has been provided for and should preclude granting of summary judgment when there is dispute as to whether or not parties intended lump sum or periodic alimony); Weiss v. Weiss, 579 So. 2d 539 (Miss. 1991) (stating that where parties are previously granted foreign divorce with reservation of right to litigate alimony, chancery court has jurisdiction to determine alimony so long as jurisdictional requirement for statutory residency is satisfied).

[25] 586 So. 2d 155 (Miss. 1991).

partition the home debt free.[26] In *Dudley*, the couple had borrowed $90,000 on their debt free home to start up a business.[27] However, the business was unsuccessful, so the wife's mother loaned the couple $50,000 to save the home from foreclosure.[28] When the wife filed for divorce, the mother filed a complaint asking the court to impress an equitable lien upon the home.[29] Reasoning that the lien was necessary to protect the mother's interest, the Mississippi Supreme Court held that unjust enrichment would result if the couple were permitted to divorce and partition the home debt free.[30]

Additionally in 1991, the Mississippi Supreme Court addressed another case involving divorce[31] as well as cases involving jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA),[32] paternity,[33] parental rights,[34] child abuse,[35] and evidence.[36]

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[26] *Dudley*, 586 So. 2d at 160. Prior to the loan in the instant case, the couple owned the home debt free. *Id.* at 156.

[27] *Id.* The couple, along with the wife's brother, opened a country/western clothing store with the loan. *Id.*

[28] *Id.* The divorced couple argued that the loan was an investment in the clothing store but the trial court disagreed, siding with the wife's mother in finding that the loan was made to save the couple's home. *Id.*

[29] *Id.* The wife's original complaint for divorce was dismissed after a hearing, but a new trial was ordered. *Id.* Prior to this new trial, the wife's mother filed her complaint asking the court to impress an equitable lien. *Id.*

[30] *Id.* at 160. The supreme court held that since the money was a loan, the lien was necessary in order to protect the mother's interest. *Id.*

[31] *See* Cherry v. Cherry, 593 So. 2d 13 (Miss. 1991) (providing that where there is evidence of cruel and inhuman treatment without sufficient evidence of condonation and recrimination, divorce should be granted).

[32] *See* Jones v. Starr, 586 So. 2d 788 (Miss. 1991) (holding that court that enters original custody decree has jurisdiction to subsequently modify decree but may decline to exercise its continuing jurisdiction upon determination that there is more convenient forum); Stowers v. Humphrey, 576 So. 2d 138 (Miss. 1991) (providing that Mississippi court has continuing jurisdiction once it enters final divorce decree but may decline to exercise such jurisdiction under UCCJA when another forum would be more convenient); Cooley v. Coley, 574 So. 2d 694 (Miss. 1991) (providing that when child custody mater has been pending before court since first award of custody, that court has continuing jurisdiction under UCCJA).

[33] *See* Wilson v. Butler, 584 So. 2d 414 (Miss. 1991) (stating that when defendant has been fully informed of pendency of action and has had time and opportunity to appear and defend himself, he cannot seek aid under the Soldier's and Sailors' Civil Relief Act to set aside paternity judgment against him without showing that his defense was materially affected by his military service); McGlaston v. Cook, 576 So. 2d 1268 (Miss. 1991) (holding that laches does not apply to bar minor child's suit for determination of paternity).

II. LEGAL PROFESSION

Editor's Note: The cases on Legal Profession have been grouped under the Administrative Law heading.

III. WILLS AND ESTATES

In *Smith v. King*,[37] the Mississippi Supreme Court held that where an administratrix and her attorney know of a child's existence and potential right of inheritance,[38] a duty lies to use reasonable diligence to ascertain such an heir by filing the name of the child in the final account and making any necessary notification to the pertinent parties.[39] The court further held that the

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[34] *See* Natural Mother v. Paternal Aunt, 583 So. 2d 614 (Miss. 1991) (providing that termination of parental rights was appropriate where natural mother abandoned her children and was morally unfit); Vance v. Lincoln Co. Dept. of Public Welfare, 582 So. 2d 414 (Miss. 1991) (holding that where there is clear and convincing evidence of erosion of parent-child relationship, chancellor is warranted in terminating parental rights); Carson v. Natchez Children's Home, 580 So. 2d 1248 (Miss. 1991) (reiterating that where there is clear and convincing evidence of sexual abuse, chancellor is justified in removing children from their natural parent).

[35] Natural Mother v. Hinds Co. Welfare Dept., 379 So. 2d 1269 (Miss. 1991) (providing that corporal punishment administered by parents that is reasonable under circumstances is not child abuse).

[36] *See* Marcum v. Mississippi Valley Gas Co., 587 So. 2d 223 (Miss. 1991) (reiterating that evidence of unsworn prior inconsistent statements are admissible to impeach credibility of witnesses); Price v. Illinois Cent. Gulf R.R., 584 So. 2d 1279 (Miss. 1991) (stating that FELA's three-year statute of limitations could be equitably tolled when cause is dismissed for procedural reasons, specifically dismissal for improper venue); Walker v. Graham, 582 So. 2d 431 (Miss. 1991) (reiterating that admission or exclusion of evidence is within discretion of trial court and will be upheld unless there is abuse of discretion).

[37] 579 So. 2d 1250 (Miss. 1991).

[38] *Smith*, 579 So. 2d at 1254-55. The court referred to relevant statutes, MISS. CODE ANN. §§ 91-1-27, 29 (1972), which require that paternity be established before an illegitimate child can inherit by intestate succession. *Smith*, 579 So. 2d at 1251-52 (citing Pascall v. Estate of Smiley, 530 So. 2d 18, 25 (Miss. 1988); Estate of Robinson v. Gusta, 540 So. 2d 30, 33 (Miss. 1984)).

[39] *Smith*, 579 So. 2d at 1251, 1253-55. Although the illegitimate child failed to adjudicate paternity within 90 days after the administratrix issued first publication to creditors as required by MISS. CODE ANN. § 91-1-15 (3)(c) (1972), the child did institute an adjudication of paternity before the running of the one year self-executing period pursuant to the same section. *Smith*, 579 So. 2d at 1251, 1254. The administratrix not only failed to notify the court of the child's existence, but also failed to notify the child of the

administratrix' failure to provide for an adjudication of heirship prior to the running of the ninety-day period under the non-claim statute, section 91-1-15(c) of the Mississippi Code did in fact constitute a fraud on the chancery court, noting that by so doing the administratrix stood to benefit from the omission.[40]

The Mississippi Supreme Court also noted that depriving an illegitimate of proper notice likely violated the illegitimate's constitutional right to due process as set forth by the United States Supreme Court in *Tulsa Professional Collection Services v. Pope*, where such omission resulted in a statutory bar to potential heirship.[41]

In *Berry v. Smith*,[42] the original will was lost wherein the testator left his entire estate to the appellee, his sole surviving daughter.[43] When the appellee presented a photostatic copy of the original for probate, the appellant-grandson[44] argued unsuccessfully on grounds that since the will was lost the testator was presumed to have intended its revocation by destruction.[45]

The Mississippi Supreme Court held that since the presumption was rebuttable by clear and convincing evidence,[46] the appellee had met this burden with a showing that the testator

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90 day period for instituting an adjudication of heirship, running from the date of the first publication to creditors instead of having a year. *Id.* at 1253.

[40] *Smith*, 579 So. 2d at 1252-53.

[41] *Id.* at 1253. In *Pope*, the United States Supreme Court held that an Oklahoma non-claim statute violated the Fourteenth Amendment due process clause because its provision for notice by publication did not provide for actual notice to "known or reasonably ascertainable creditors . . . by mail or other means as certain to assure actual notice." *Id.* at 1254; *see Caldwell*, 533 So. 2d at 417-18 (citing *Pope*, 485 U.S. at 478). Since the administratrix failed to provide "actual notice to a known or reasonably ascertainable heir" and the point was not raised by the appellant, the court felt compelled to raise this as a constitutional error. *Id.* at 1251 (citing MISS. SUP. CT. R. 28(a)(3)).

[42] 584 So. 2d 400 (Miss. 1991).

[43] *Berry*, 584 So. 2d at 401, 402 & n.1. The testator had apparently locked the will in a desk for years, but upon his death, the will could not be found in spite of a diligent search.
Id. at 401.

[44] *Id.* The appellant-grandson was an heir at law of the testator, since his mother had predeceased her father by ten years. *Id.*

[45] *Id.* at 402.

[46] *Id.* at 403, 405. The court set forth that recent cases have required rebuttal of the lost will presumption by clear and convincing evidence. *Id.* at 403-04 (citing Estate of Willis v. Willis, 207 So. 2d 348, 349 (Miss. 1968); James v. Barber, 142 So. 2d 21, 27 (Miss. 1962)).

had spoken frequently to others about the will and had a continuing close and affectionate relationship with his daughter.[47]

In *Amyotte v. Hollingsworth*,[48] the Mississippi Supreme Court addressed once again the strict statutory mandate of § 91-5-1 of the Mississippi Code requiring that all holographic wills be subscribed by the testator,[49] and held that where a holographic will does not contain the requisite subscription, the Mississippi's firmly established bright-line test would control and thereby invalidate the will.[50]

In *Raspilair v. Estate of Raspilair*,[51] the court addressed the issue of whether a decedent's ex-spouse was entitled to collect from the decedent's estate the face amount of a life insurance policy required under the divorce decree where the decedent had allowed the policy to lapse.[52] The court held that the ex-spouse was entitled to collect from the estate that which she would have received were the policy in force upon the decedent's death, minus any proof the estate could provide of any unpaid debts the insurance was intended to secure.[53]

The Mississippi Supreme Court addressed the issue of whether parol evidence may vary the terms of survivorship clauses in will substitutes in *Cooper v. Crab*,[54] where the decedent executed a will leaving her entire estate to six grandnephews and grandnieces.[55] As the health of the decedent began to decline, the appellant and grandmother (decedent's sister) of the beneficiaries moved in with decedent and assisted with decedent's physical needs and financial affairs.[56] Such assistance culminated in the execution of certificates of deposit containing survivorship clauses naming decedent's sister as a joint tenant with right of survivorship, thereby "substantially eviscerating the plan of decedent's will."[57] The grandchildren filed suit against their grandmother when they realized that if the survivorship clauses controlled the disposition of funds embodied in the certificates, a large part of the assets of decedent's estate would pass to the grandmother rather than to them through the will previously executed.[58] The chancery court held for the plaintiff-appellees by allowing in parol evidence to vary the express terms of the survivorship clauses in the certificates, finding that the defendant-appellant was in fact a fiduciary who jointly held the certificates for convenience in managing and assisting in the decedent's financial affairs.[59]

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[47] *Berry*, 584 So. 2d at 403.

[48] 585 So. 2d 731 (Miss. 1991).

[49] *Amyotte*, 585 So. 2d at 733 (citing MISS. CODE ANN. § 91-5-1 (West Supp. 1989)).

[50] *Amyotte*, 585 So. 2d at 735. The court followed the standard it set forth in *Wilson v. Polite*, 218 So. 2d 843, 853-54 (Miss. 1969), where the court invalidated a holographic will that contained the name of the testatrix five lines from the end of the instrument in a sentence, holding that "the name so appearing was part of a sentence" and "not at the end of the will." *Amyotte*, 585 So. 2d at 733-34 (citing *Wilson*, 218 So. 2d at 853-54 (emphasis omitted)).

[51] 583 So. 2d 970 (Miss. 1991).

[52] *Raspilair*, 583 So. 2d at 970-72.

[53] *Id.* at 972. The decree provided that in addition to alimony, the decedent would maintain $30,000 in life insurance until the payment of existing debts. *Id.* at 971.

[54] 587 So. 2d 236 (Miss. 1991).

[55] *Cooper*, 587 So. 2d at 237-38. Decedent's estate consisted of both personal and real property, valued at $43,276.95. *Id.* at 238.

The Mississippi Supreme Court held, reversed, and remanded[60] on grounds that while it agreed that a fiduciary relationship existed, the chancellor failed to address the plaintiff-appellees' allegations in their pleadings that the defendant-appellant procured the certificates of deposit through undue influence.[61] The court held further that where will substitutes are in fact properly executed without "proof of forgery, fraud, duress or undue influence," such instruments will as a matter of law control over a previously executed will with conflicting terms.[62]

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[56] *Id.*

[57] *Id.* at 238, 242-43.

[58] *Id.* at 238.

[59] *Id.* at 241-44. The court concluded that such agreements were facially valid and not subject to alteration by parol evidence. *Cooper*, 587 So. 2d at 241-42 (citing Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber Supply Co., Inc., 584 So. 2d 1254 (Miss. 1991); Sullivan v. Estate of Eason, 558 So. 2d 830, 832 (Miss. 1990); Ross v. Brasell, 511 So. 2d 492, 495 (Miss. 1987); Smith v. Falke, 474 So. 2d 1044, 1046 (Miss. 1985)). The court observed that will substitutes are generally effective as methods whereby citizens could avoid probate. *Cooper*, 587 So. 2d at 239; *see* MISS CODE ANN. § 81-5-63 (1972) (providing for joint accounts with right of survivorship); In re Will and Estate of Strange, 548 So. 2d 1323, 1325 (Miss. 1989) (such instruments may operate as present and completed gifts vested in joint ownership); Anderson v. Burt, 507 So. 2d 32. 36 (Miss. 1987) (inter vivos gift).

[60] *Cooper*, 587 So. 2d at 244.

[61] *Id.* at 242-43. The court reasoned that since the certificates of deposit were facially valid, they could only be defeated by a legally cognizable defense such as undue influence. *Id.* at 242-43; *see* Mullins v. Ratcliff, 515 So. 2d 1183, 1193-94 (Miss. 1987) (providing the present standard for determining undue influence).

In *Schneider v. Schneider*,[63] a chancellor dismissed a complaint filed by the appellant to contest a will[64] which the appellee had filed for probate in common form, holding that the mere filing of a complaint would not toll the statute of limitations.[65] However, the Mississippi Supreme Court reversed and remanded, holding that while the chancellor had applied the previous decisions correctly under the law in effect at the time the cases were decided,[66] the *Mississippi Rules of Civil Procedure* had since superceded all previous court decisions as well as conflicting statutes governing procedure.[67] Furthermore, the court held that since Rule 3 provides that a suit is commenced upon the filing of the complaint,[68] and since Rule 4 requires the clerk to issue summons to the necessary parties,[69] then the appellant's claim was not time barred under Section 91-7-23 of the Mississippi Code.[70]

In *Bell v. Mitchell*,[71] an aggrieved creditor appealed the chancellor's denial of his timely filed claim and motion to amend the claim,[72] where the executrix asserted that the creditor failed to strictly comply with certain statutory procedures, including a failure to timely file an original or certified copy of a promissory note with the claim.[73]

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[62] *Cooper*, 587 So. 2d at 240, 242, 244.

[63] 585 So. 2d 1275 (Miss. 1991).

[64] *Schneider*, 585 So. 2d at 1276.

[65] *Id.* (citing MISS. CODE ANN. § 91-7-23, -25 (1972)). The decedent executed the will almost two years after the execution of the codicil and nearly eight years subsequent to the will brought forth and presented by the appellant. *Schneider*, 585 So. 2d at 1276.

[66] *Schneider*, 585 So. 2d at 1277.

[67] *Id.* The Rules Reconciliation Act, Chapter 573, Laws 1991, provided that all code sections on civil procedure that were not in harmony with the MISSISSIPPI RULES OF CIVIL PROCEDURE were amended accordingly. *Schneider*, 585 So. 2d at 1277. All code sections that conflicted with the MISSISSIPPI RULES OF CIVIL PROCEDURE were repealed. *Id.*

[68] *Schneider*, 585 So. 2d at 1277-78; *see* MISS. R. CIV. P. 3 (setting forth precise date for commencement of action based upon date of filing complaint with clerk or judge).

[69] *Schneider*, 585 So. 2d at 1277-78; *see* MISS. R. CIV. P. 4 (providing that after action is commenced pursuant to Rule 3, clerk is required to issue summons to parties).

[70] *Schneider*, 585 So. 2d at 1277-78 (citing MISS. R. CIV. P. 3, 4).

[71] 592 So. 2d 528 (Miss. 1991).

[72] *Bell*, 592 So. 2d at 529. The creditor's uncontroverted testimony established that the creditor, unrepresented by counsel, presented both the original promissory note and a photostatic copy at the clerk's office. *Id.* The undisputed evidence indicated that the creditor then left a photostatic copy of the original note to be filed with the chancery clerk. *Id.*

The Mississippi Supreme Court reversed and remanded,[74] holding that since the creditor acted in good faith and substantially complied with the statutory requirements,[75] then the chancellor's denial of both the creditor's claim and his motion to amend the claim was in error.[76] The Mississippi Supreme reiterated the well-reasoned principle that where a procedural statute is amended during pending actions, the amended statute will apply retrospectively to govern the pending actions.[77]

The Mississippi Supreme Court addressed a lawsuit arising out of an executor's management of an estate in *McCaffrey v. Fortenberry*,[78] a principle issue involving the executor's withdrawal of attorney's fees without prior court approval.[79] The court held that while Fortenberry had completely rebutted allegations of undue influence over Mrs. McCaffrey with a clear and convincing showing of her strong will and business acumen,[80] Fortenberry's countervailing loyalty and excessive deference toward Mrs. McCaffrey's wishes regarding the payment of attorney's fees did not relieve him of complying with the applicable chancery court rules and statutory obligations.[81]

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[73] *Id.* at 528-30; MISS. CODE ANN. § 91-7-149 (West Supp. 1990).

[74] *Bell*, 592 So. 2d at 533.

[75] *Id.* at 530-32 (citing Central Optical Merchandising Co., v. Lowe, 160 So. 2d 673, 678-80 (1964) (setting forth substantial compliance as the new test).

[76] *Bell*, 592 So. 2d at 533. The court stated that "strict compliance with statutes relating to probate of claims against estates so as to defeat a just claim is no longer a controlling principle of interpretation." *Id.* at 532 (citing Williams v. Mason, 556 So. 2d 1045, 1050 (Miss. 1990); Ethridge v. Estate of Paul, 196 So. 2d 530, 532 (Miss. 1967)).

[77] *Bell*, 592 So. 2d at 532 (citing City of Clarksdale v. Mississippi Power & Light Co., 556 So. 2d 1056, 1057 (Miss. 1990) (amended statutes affecting mode of procedure apply to pending actions); *see also* Stone v. Independent Linen Serv. Co., 55 So. 2d 165, 168 (1951) (following the rule in *Deposit Guaranty*, *infra*); Deposit Guaranty Bank & Trust Co. v. Williams, 9 So. 2d 638 (Miss. 1942) (since no vested rights in usury laws, such laws may be repealed or amended with retrospective effect on pertinent matters in pending suits)).

[78] 592 So. 2d 52 (Miss. 1991).

[79] *McCaffrey*, 592 So. 2d at 54.

[80] *Id.* at 61-62. The court did note that since Mrs. McCaffrey seemed to be "ready, willing and capable of managing an estate's income and disbursements, then the proper course for a fiduciary would be directed at efforts to bring about a closure and distribution of the estate assets without delay." *Id.* at 64.

In *Johnson v. Howell*,[82] the Mississippi Supreme Court addressed a appeal arising out of two conflicting chancery decrees which were rendered in the same county and separated by a gap in time of over eight years.[83] Both decrees adjudicated an intestate distribution of assets involving the same parties and claims.[84] The court held that the action resulting in the second decree was barred by the two year statute of limitations[85] as well as by res judicata.[86]

In *Dedeaux v. Dedeaux*,[87] the testator's three sons[88] appealed a chancellor's adverse decision involving the construction of the testator's holographic will drafted in simple layman's terms, alleging that the will was ambiguous and erroneously construed.[89] Finding no ambiguity,[90] the Mississippi Supreme Court affirmed and held that since the testator clearly expressed, albeit in layman's terms,[91] an intent to designate his wife as sole legatee and devisee,[92] then the court was bound to follow and give effect to the testator's intent.[93]

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[81] *Id.* at 62, 65-66. The argument was based on UNIFORM CHANCERY COURT RULES 6.01 and 6.07. *Id.* The appellants also based there argument on Fortenberry's alleged violation of MISS. CODE ANN. § 91-7-281 (1972). *McCaffrey*, 592 So. 2d at 62.

[82] 592 So. 2d 998 (Miss. 1991).

[83] *Johnson*, 592 So. 2d at 999.

[84] *Id.* at 1000.

[85] *Id.* at 999-1000.

[86] *Id.* at 1002.

[87] 584 So. 2d 419 (Miss. 1991).

[88] *Dedeaux*, 584 So. 2d at 420.

[89] *Id.* Mrs. Dedeaux, testator's wife and sole legatee-devisee, submitted the will to the chancery court, which was admitted to probate. *Id.* The will read in pertinent part:

> It is my desire that if I should preceed [sic] my wife Kay in death that all of my earthly possessions be received by her.
>
> Should she preceed [sic] me in death; or should we die together; or at her death I would like to leave the following possessions as listed . . .

Id.

[90] *Id.* at 421. The court observed that the appellant's reliance on two Kentucky cases was misplaced and summarily dismissed their argument. *Id.* (citing Smith v. White, 378 S.W. 2d 622 (Ky. Ct. App. 1964); Whitehead v. Donnelly, 368 S.W. 2d 337 (Ky. Ct. App. 1963)).

[91] *Dedeaux*, 584 So. 2d at 421. The court reasoned that even where awkward, nonlegal terminology is used, so long as the language "leaves little doubt in the minds of persons of ordinary experience and intelligence as to what he meant," the court would strictly follow the manifest intent of the testator. *Id.* (citing Paine v. Sanders, 135 So. 2d 188, 192 (Miss. 1961)).

[92] *Dedeaux*, 584 So. 2d at 421-23.

IV. Constitutional Law

In 1991, the Mississippi Supreme Court handed down several decisions involving issues under the federal and state constitutional provisions. Cases which will not receive textual treatment involve the areas of search and seizure under the Fourth Amendment,[94] forfeiture of property regarding narcotics violations,[95] public officers contracting with government entities,[96] and liberty interests asserted by prisoners.[97] Decisions rendered by the court which will be afforded textual treatment for purposes of this review involve the area of municipal ordinances,[98] due process as to administrative forfeiture proceedings,[99] searches of student lockers,[100] and the dormant initiative and referendum amendment under the State constitution.[101]

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[93] *Id.* at 421 (citing *In re* Estate of Vick, 557 So. 2d 760, 765 (Miss. 1989); Stovall v. Stovall, 360 So. 2d 679, 681 (Miss. 1978); Lanham v. Howell, 49 So. 2d 701, 702 (Miss. 1951); Rice v. McMullen, 43 So. 2d 195, 202 (Miss. 1949); Yeates v. Box, 22 So. 2d 411, 413 (Miss. 1945)).

[94] Jones v. State *ex rel* Mississippi Dept. of Pub. Safety, 592 So. 2d 44 (Miss. 1991) (court upheld consent search of automobile as reasonable since there was no evidence of concern and party executed knowing and voluntary waiver of constitutional right).

[95] Miss. Code Ann. § 41-29-153 (Supp. 1990); Hickman v. State *ex rel* Mississippi Dept. of Pub. Safety, 592 So. 2d 44 (Miss. Dec. 4, 1991) (where seized funds constitute evidence of violations under Controlled Substances Act, test for forfeitability of such funds to State is whether, given all evidence considered together, rational trier of fact could find by preponderance of evidence that funds were, in fact, either product or instrumentalities or violations of Act); Jackson v. State *ex rel* Mississippi Bureau of Narcotics, 591 So. 2d 820 (Miss. 1991) (state forfeiture statute to be strictly construed and State must present facts indicative of intention to use vehicle in illegal activity thereby warranting forfeiture of such vehicle).

[96] State v. Aseme, 583 So. 2d 955 (Miss. 1991) (physician with staff privileges at public hospital does not have contract such that services of physician upon hospital's Board of Trustees violates Article 4, § 109 of Mississippi Constitution and Miss. Code Ann. § 25-4-105(2) (Supp. 1990).

[97] McFadden v. State, 580 So. 2d 1210 (Miss. 1991) (no constitutionally based liberty interest entitling prisoner to hearing before prison transfer or reassignment to new prison job, absent state law or regulation conditioning such transfer on proof of misbehavior or other specified events), *citing* Matiyn v. Henderson, 841 F.2d 31, 34 (2d Cir. 1988) and Smith v. State, 580 So. 2d 1221 (Miss. 1991) (neither Due Process Clause of Fourteenth Amendment or Miss. Code Ann. § 47-7-47 (Supp. 1990) creates constitutionally protected liberty interest in form of expectation of release on probation).

[98] Nichols v. City of Gulfport, 589 So. 2d 1280 (Miss. 1991).

[99] Threlkeld v. State *ex rel* Mississippi Dept. of Wildlife Fisheries and Parks, 586 So. 2d 756 (Miss. 1991).

In *Nichols v. City of Gulfport*,[102] joint owners of a nightclub brought suit against the City of Gulfport challenging the constitutionality of the city's noise ordinance.[103] Following trial,[104] the lower court held that the ordinance was not unconstitutionally void on its face and was not so broad, vague or indefinite in its standards as to make its application unconstitutional.[105] The Mississippi Supreme Court reversed and rendered holding that the challenged section of the ordinance failed to provide clear notice and sufficiently definite meaning of the conduct that was prohibited and thus found the provision unconstitutionally vague.[106] The court stated that whether a noise is "unnecessary,"

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[100] In the Interest of S.C. v. State, 583 So. 2d 188 (Miss. 1991).

[101] State *ex rel* Moore v. Molpus, 578 So. 2d 624 (Miss. 1991).

[102] 589 So. 2d 1280 (Miss. 1991).

[103] *Nichols*, 589 So. 2d at 1281. The ordinance, Ordinance No. 628, "An Ordinance to Prohibit Unnecessary and Unusual Noises in the City of Gulfport, Mississippi," which had been adopted nearly fifty years ago contained language in Section 1 prohibiting "unnecessary or unusual noises . . . which either annoys, injures or endangers the comfort, repose, health or safety of others. . . ." *Id.* Those found in violation of the ordinance would be found guilty of misdemeanors and upon conviction punished by a fine of not more than $100 or imprisonment for not more than thirty days, or both. *Id.* Each of the joint owners of the nightclub on prior occasions had been arrested and charged with violations of the ordinance because of loud, annoying, and unnecessary noise and music emanating during the late hours of the night from loudspeakers located inside and outside the establishment. *Id.*

[104] *Id.* The owners testified at trial that they had taken active measures to comply with the ordinance by erecting a sound fence and employing an audiologist to conduct various tests and measure noise levels. *Id.* Both owners stated that they did not know when the noise coming from the nightclub reached a point as to be violative of the ordinance and were unable to find out how loud the music should be. *Id.* Testimony from a police officer revealed that the ordinance was enforced strictly on its face via a signed complaint from any citizen complaining of noise and no objective criteria were used by police in processing the complaint. *Id.* at 1281-82.

[105] *Id.* at 1281. The owner contended that the ordinance violated the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article 3, section 14 of the Mississippi Constitution of 1890 because it was facially void for vagueness. *Id.* at 1282.

[106] *Id.* at 1282. The court stated that the law should give fair notice of the offending conduct, or else the law is void for vagueness. *Id. See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("void-for-vagueness doctrine requires that penal statute's define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"); Cassibry v. State, 404 So. 2d 1360, 1367-68 (Miss. 1981) (criminal statute

"unusual" or "annoying" certainly depends upon the ear of the listener and a statute is unconstitutionally vague when the standard of conduct it specifies is dependent upon the individualized scrutiny of each complainant.[107] The court concluded by stating that the ordinance could be more clearly worded and more narrowly drawn while still protecting the citizens from noises that may affect their comfort, repose, health or safety.[108]

In *Threlkeld v. State ex rel Mississippi Dep't of Wildlife Fishery & Parks*,[109] the court construed the forfeiture statute[110] for illegal hunting[111] and fishing to include an innocent owner exception so as to not violate due process provisions under the state constitution.[112] A game and fish officer issued a citation for "spotlighting" deer and confiscated a vehicle and gun used in the illegal activity.[113] Upon challenge to the forfeiture statutes, the court decided to read in an innocent owner exception[114] as a

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unconstitutional if it is so vague and uncertain that it does not inform subject to it what acts to avoid or what conduct will amount to penalties).

[107] *Nichols*, 589 So. 2d at 1284. The court found no setting from which the three words used in the ordinance could take on a reasonable degree of definiteness. *Id.* at 1283. In support of its conclusions, the court cited cases involving the constitutionality of other municipal ordinances including Coates v. City of Cincinnati, 402 U.S. 611 (1971), People v. New York Trap. Rock Corp., 57 N.Y.2d 371 (1982) and Fratiello v. Manasco, 653 F. Supp. 775 (D.R.I. 1987).

[108] *Nichols*, 589 So. 2d at 1284.

[109] 586 So. 2d 756 (Miss. 1991).

[110] MISS. CODE ANN. § 49-7-251 to 49-7-257 (1972).

[111] MISS. CODE ANN. § 49-7-103 (1972).

[112] MISS. CONST. art. 3 § 124 provides that: "No person shall be deprived of life, liberty, or property except by due process of law."

[113] *Threlkeld*, 586 So. 2d at 757. An officer of the Department of Wildlife Fisheries and Parks for the State of Mississippi seized the subject property after observing Threlkeld's son, Chad, "headlighting" deer in violation of MISS. CODE ANN. § 49-7-103 (1972). *Threlkeld*, 586 So. 2d at 757. At the forfeiture hearing, Bonnie Threlkeld, the owner of the property, moved for a directed verdict because the state failed to prove that Bonnie had any knowledge that the vehicle would be used for illegal purposes. *Id.* The State replied that, under the statute, the owner's knowledge was immaterial and the court denied her motion. *Id.* She testified that although Chad was permitted to use the truck whenever his parents weren't using it, he had not been given permission to use the truck on that particular night. *Id.* Chad's father also testified that Chad could use the rifle at any time but stated that Chad did not have permission to use it for illegal hunting nor did he have any knowledge that Chad had ever used it for that purpose. *Id.* The lower court noted that, unlike the narcotics forfeiture law, the statute at issue did not contain an exception for innocent owners and therefore held the vehicle and gun be forfeited. *Id.*

[114] *Threlkeld*, 586 So. 2d at 757-59. The court reviewed its prior discussions giving

literal reading of the statute would be violative of the Mississippi Constitution's due process guarantee.[115] Since forfeiture statutes are penal in nature, must be strictly construed,[116] and the burden is upon the State to prove forfeiture by a preponderance of the evidence,[117] the court reversed and remanded the case since the State failed to present evidence sufficient to meet that burden.[118]

In *S.C. v. State*,[119] school officials searched a high school student's locker and found two handguns located therein.[120] Finding his explanation for the presence of the guns unpersuasive,[121] the court turned to the student's contentions that the

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protection to innocent owners who had established that they had not "knowingly permitted [their property] to be used for an unlawful purpose in violation of the highway penal statutes, providing for its seizure and confiscation. . ." Stringer v. State, 91 So. 2d 263, 268 (Miss. 1956). The court noted that although the United States Supreme Court had rejected an innocent owner defense to a forfeiture proceeding in Calero Toldeo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), it stated that many other lower courts had seized upon dicta in *Calero Toledo* which set out certain conditions for an owner to satisfy, including lack of knowledge of any wrongful activity and a reasonable prevention of any proscribed use of his property, in order to make a valid claim that a forfeiture statute be deemed unconstitutional. *Threlkeld*, 586 So. 2d at 757-59.

[115] Riley v. State, 562 So. 2d 1206, 1211 (Miss. 1990). The court repeated the longstanding rule that when it "is confronted with a statute a literal construction of which would render if unconstitutional, the court must adopt such a construction, when reasonably possible, as will save the statute. . ." *Id.* (quoting Jackson v. State, 337 So. 2d 1242, 1251 (Miss. 1976)).

[116] Saik, v. State, 473 So. 2d 188, 191 (Miss. 1985); Zambroni v. State, 217 Miss. 418, 64 So. 2d 335 (1953).

[117] *Saik*, 493 So. 2d at 191.

[118] *Threlkeld*, 506 So. 2d at 759.

[119] 583 So. 2d 188 (Miss. 1991). Pursuant to MISS. CODE ANN. § 43-21-201 *et seq.* (1972), the case at bar was deemed confidential. *S.C.*, 583 So. 2d 188 at n.1. Accordingly, the initials S.C. were used throughout the opinion to protect the youth's identity. *S.C.*, 583 So. 2d at 188, n.1.

[120] *S.C.*, 583 So. 2d at 189. S.C. arrived at school and offered to sell another student two handguns, a .32 caliber revolver and a .22 caliber revolver, respectively. *Id.* The student declined and later reported that S.C. had the guns at school to the assistant principal. *Id.* Two assistant principals then asked S.C. if he would open his securely locked locker, and he complied. *Id.* The assistant principles found a bag containing the two guns and then called S.C.'s grandparents and the police. *Id.* Thereafter, the Harrison County Family Court adjudged S.C. a delinquent child under MISS. CODE ANN. §§ 43-21-105(i) and (j) and 97-37-1 and -17 (1972), and ordered S.C. delivered to the custody of the Department of Human Services for transfer to the Juvenile Training School at Oakley. *S.C.*, 583 So. 2d at 189.

[121] *S.C.*, 583 So. 2d at 190. The court found S.C.'s attempt to deny the guns were his

search[122] of his locker and attendant seizure of the guns violated federal[123] as well as state[124] provisions against unreasonable searches and seizures.[125] Although finding that students have a reasonable expectation of privacy in their school lockers, the court held that public officials have authority to search a student's locker without a warrant so long as they otherwise have reasonable grounds therefor.[126]

In *State ex rel. Moore v. Molpus*,[127] the Attorney General of Mississippi, along with two members of the Mississippi House of Representatives presented the Secretary of State of Missis-

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to be unavailing. *Id.* S.C. claimed others had either given him the bag or asked him to keep the bag in his locker with him not knowing what was in the bag. *Id.* The evidence reflected that S.C. had exclusive possession of the locker and that he kept it under lock and key. *Id.* The court noted the Family Court was within its prerogative in rejecting S.C.'s asserted stories, particularly in light of the student who informed the assistant principals of the matter. *Id.*

[122] *Id.* at 190. The court began by stating that school officials have broad authorities with which the law will brook little interference, and disciplining student offenders is among these authorities. *See, e.g.*, Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455 (Miss. 1986); Clinton Municipal Separate School District v. Byrd, 477 So. 2d 237, 240-42 (Miss. 1985).

[123] *S.C.*, 583 So. 2d at 190. The court reviewed federal cases regarding constitutional issues in the area of school official and student relations. West Virginia State Bd. of Educ. v. Barnett, 319 U.S. 624 (1963) (school officials to perform discretionary functions within limits of Bill of Rights); *cf.* New Jersey v. T.L.O., 469 U.S. 325 (1985) (warrants not required [on school property], i.e., "the warrant requirement, in particular, is unsuited to the school environment'. . . .").

[124] Miss. Const. Art. 3, § 23 (1890) (prohibition against unreasonable searches and seizures).

[125] *S.C.*, 583 So. 2d at 191. The court, in applying the principles of New Jersey v. T.L.O, 469 U.S. 325 (1985), held that within the contemplation of Section 23 of the Mississippi Constitution, students have a reasonable expectation of privacy in their school lockers. *S.C.*, 583 So. 2d at 192. However, the court stated that because the privacy interest a student has in his locker is less than it would be in either his home or automobile, and because it necessarily clashes with the broad discretionary authority and responsibility of the school officials, a lesser showing is required before school officials may have authority to search a student's locker. *S.C.*, 583 So. 2d at 192. Thus, the court noted that although Section 23 ordinarily requires a warrant to be issued upon probable cause, the facts of the case produced an exigency such that the warrant proviso was properly excepted. *S.C.*, 583 So. 2d at 192.

[126] *S.C.*, 583 So. 2d at 189. The court viewed the school official's action upon the student informant's information as reasonable under the circumstances and concluded the school officials had reasonable grounds to search S.C.'s locker without a warrant. *Id.* at 192.

[127] 578 So. 2d 624 (Miss. 1991).

sippi[128] with an initiative petition calling for a public election on repeal of Section 98 of the Mississippi Constitution which imposed a ban on lotteries.[129] After the Secretary of State refused the petition, the plaintiffs filed suit in circuit court seeking a declaratory judgment that the initiative and referendum amendment[130] inserted into the Constitution in 1916 was valid and enforceable.[131] Plaintiffs also sought an order compelling the Secretary to place on the ballot for the next succeeding statewide general election their initiative proposing repeal of Section 98.[132] The Secretary answered contending *inter alia*, that plaintiffs be denied relief on the grounds of *res judicata*,[133] collateral estoppel, stare decisis and related principles of finality and repose.[134]

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[128] *Id.* at 630. Michael C. Moore sued in his official capacity of attorney general and also in the name of the State of Mississippi. *Id.* He was joined by Representatives Raymond Vecchio and Oliver E. Diaz, Jr. *Id.* Dick Molpus, as Secretary of State, refused the petition under the holding of Power v. Robertson, 130 Miss. 188, 230-31, 93 So. 709, 775-77 (1922).

[129] *Moore*, 578 So. 2d at 630. The Mississippi Constitution states: "No lottery shall ever be allowed . . . in this State." MISS. CONST. art. 4, § 98 (1890).

[130] *Moore*, 578 So. 2d at 628. In 1914, the legislature adopted a resolution, House Concurrent Resolution No. 24 Miss. Laws, ch. 520 (1914), which directed referral to the people of an amendment which would have placed in the Constitution an initiative and referendum (I&R) petition procedure. *Id.* at 627. H.C.R. 24 directed that the proposed I&R Amendment be submitted to the voters at the general election to be held on November 3, 1914, "in accordance with the provisions of Section 273 of the Constitution." *Id.* at 628. In its 1916 Regular Session, the Senate adopted Senate Concurrent Resolution No. 18, directing that the amendment be inserted into the Constitution, and the House concurred on March 29, 1916. *Id.* The I&R Amendment was then formally inserted into the Constitution and appeared there as Article 4, Section 33 in I Hemingway's Mississippi Code 15-153 (1917). *Id.*

[131] *Moore*, 578 So. 2d at 631; *see* MISS. R. CIV. P. 57.

[132] *Moore*, 578 So. 2d at 631.

[133] *Id.* Secretary Molpus presented the final judgment in Power v. Robertson, 93 So. 769, 775-77 (Miss. 1922). *Power* overruled a previous decision by the court announced in State ex rel. Howie v. Brantley, 74 So. 662, 666-67 (Miss. 1917), which had held that the I&R Amendment had been properly submitted, ratified and added to the Constitution. *Moore*, 578 So. 2d at 629. The *Power* court held the I&R Amendment void on grounds it was in law "more than one amendment" and, contrary to Section 273, had been submitted in a form which combined in one measure the disperate subjects of legislative enactments and constitutional amendments. *Id.* The court noted that central to the *Power* decision was the notion that initiating or repealing legislation and amendment of the constitution "are separate and distinct things." *Id.* Thus, by overruling *Brantley*, the *Power* court held that the Initiative and Referendum Amendment was "unconstitutional and void." *Power*, 93 So. at 777.

[134] *Moore*, 578 So. 2d at 631.

Secretary Molpus then moved for summary judgment and the circuit court granted the motion dismissing the complaint with prejudice.[135] The Mississippi Supreme Court affirmed, holding, *inter alia*, that the state constitution's Bill of Rights did not compel resurrection of the I&R Amendment,[136] stare decisis principles applied as to prior precedents,[137] and the rule of collateral estoppel precluded relitigation of the central issue dealing with initiative and referendum.[138]

V. INSURANCE

In 1991, the Mississippi Supreme Court rendered seven decisions involving insurance.[139] This section will focus on three decisions which provided significant developments in or modifications to insurance law in Mississippi.[140] The remainder of the cases followed existing law and will therefore not be discussed textually.

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[135] *Id.* Secretary Molpus placed reliance on the *Power* case and argued that it rendered the I&R Amendment wholly unenforceable. *Id.*

[136] *Id.* at 673. The court noted that the state constitution opted for a representative democracy under the premise that the legislative power shall be exercised by those elected by the people rather than directly by the people themselves. *Id.* Thus, the court found nothing in the Bill of Rights of the Mississippi Constitution to compel initiative and referendum. *Id.* MISS. CONST. Art. 3, § 5, 6 (1890).

[137] *Moore*, 578 So. 2d at 633. The court viewed the *Power* decision and remarked that:

> [W]eighty considerations of finality and repose counsel restraint in the face of sixty-eight year old precedent, even if we be convinced it was wrongly decided. In most settings the mere fact that a prior ruling may have been wrong - even badly wrong - is not enough to move the judicial hand.

Id.; *see* Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981); City of Mound Bayou v. Johnson, 562 So. 2d 1212, 1220 (Miss. 1990); Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 465 (Miss. 1983). The court stated that one accepted ground for overruling a demonstrably erroneous prior constitutional interpretation is that across the years it has produced great and sustained harm. *Moore*, 578 So. 2d at 635. The court addressed this concern by finding no seriously pressed suggestion that *Power* perpetuates a specific adverse or harmful effect beyond that of preventing an immediate direct referendum on whether Mississippi should have a lottery. *Id.*

[138] *Moore*, 578 So. 2d at 643. The court ruled that collateral estoppel precluded relitigation of whether the I&R amendment was proposed and ratified and made a part of the Constitution with the pre-1959 provisions of Section 273. *Id. Power v. Robertson* yielded a final judgment on that issue, and that judgment has enjoyed repose and remained undisturbed for close to sixty-nine years. *Moore*, 578 So. 2d at 643. The court stated that the final judgment precluded the Attorney General, acting on behalf of the State of Mississippi, and the Representatives, as officials or the same body politic, from relitigating the Section 2731 I&R issue. *Moore*, 578 So. 2d at 644.

[139] Young v. Southern Farm Bureau Life Ins. Co., 592 So. 2d 103 (Miss. 1991) (discussed textually); Carter v. Allstate Indemnity Co., 592 So. 2d 66 (Miss. 1991) (discussed textually); Crawley v. American Public Life Ins. Co., 592 So. 2d 79 (Miss. 1991) (summary judgment as to deniability of coverage precluded where there is genuine issue of

A. Life Insurance

In *Young v. Southern Farm Bureau Life Insurance Co.*,[141] the court had to decide "when does an action for the wrongful refusal to pay life insurance benefits accrue." Young's decedent purchased life insurance from Southern Farm Bureau for $25,000 in whole life coverage with an additional $25,000 in accidental death benefits.[142] Young presented the local agent with a check for the quarterly premium shortly after the lapse of a spe-

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material fact as to whether or not insured informed insurer's agent of certain conditions during application stage); Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79 (Miss. 1991) (while there may be no formal fiduciary relationship between bank-agent and customer, where court finds that customer has relied on such relationship through course of dealing and has placed trust and confidence to the extent that customer has become "less vigilant" about the status of credit life insurance coverage, then bank-agent has duty to notify customer when credit life insurance policy has lapsed); Commercial Union Ins. Co. v. Dairyland Ins. Co., 584 So. 2d 405 (Miss. 1991) (where default judgment against insured in county court is later set aside, automobile insurer cannot maintain that it is further prejudiced in separate chancery court action when UM carried does not have opportunity to show automobile insurer was obligated to pay for damages caused by insured); Hancock Bank v. Travis, 580 So. 2d 727 (Miss. 1991) (discussed textually); St. Paul Property and Liability Ins. Co. v. Nance, 577 So. 2d 1238 (Miss. 1991) ("plaintiff's release and discharge of the underinsured tortfeasor who caused her personal injuries operates as well to preclude a subsequent subrogation suit by her uninsured motorist carrier").

[140] *Young*, 592 So. 2d at 103; *Carter*, 592 So. 2d at 66; *Hancock*, 580 So. 2d at 727.

[141] 592 So. 2d 103 (Miss. 1991).

[142] *Young*, 592 So. 2d at 104. Two years later on December 18, 1982, the premium for the policy remained unpaid beyond the thirty-one day grace period for reinstatement. *Id.* On January 22, 1983, a notice of extended term insurance was mailed giving the insured a sixty day special offer in which the policy could be reinstated without evidence of insurability. *Id.* The notice stated, *inter alia*, that the original policy could be restored if the policyholder remitted the stated quarterly premium within sixty days of December 18, 1982. *Id.* The payment was not made within this sixty day period and on February 22, 1983, another special offer letter was mailed to the policyholder regarding an invitation to reinstate the previous insurance coverage for a special sixty day period. *Id.* Because this sixty day period had already terminated when the second special offer letter was mailed, the insurer explained this letter was sent to the policyholder due to "managerial oversight." *Id.*

cial offer period had occurred.[143] Based on a special offer made by the insurer, Young asserted that the original life insurance coverage, $25,000 whole life and $25,000 accidental death, was reinstated on her husband's life.[144] The insurer later informed its agent that the original policy had lapsed and returned the check for the quarterly premium with instructions that the draft be returned to the policyholder.[145] After Young's decedent died as a result of an accident, Southern Farm Bureau via its agent disbursed the proceeds of the policy in effect at the time of decedent's death.[146] These benefits included extended term benefits totalling $25,477.02 but did not include accidental death benefits.[147] The agent stated by affidavit that he explained to Young that she would only receive the extended term benefits because the accidental death provision was no longer in effect, and Young thereafter signed a death benefits claim form to this effect.[148] Young testified that when she signed the claim form, it was not filled out and that she never understood she was to receive less than $50,000 until the agent later brought the lesser amount to her home.[149] Young subsequently negotiated the benefits check for $25,472.02.

Six years and two months after the death of her husband, Young filed suit in circuit court alleging that Southern Farm Bureau had breached its duty of fair dealing and good faith for the failure to pay the entire policy proceeds.[150] Southern Farm answered asserting the defenses of accord and satisfaction and procedural bar under the applicable statute of limitations.[151] After

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[143] *Id.* Young received the second special offer letter a few days later which stated that if the premium had been paid within the last few days then it should be disregarded. *Id.*

[144] *Id.*

[145] *Id.* at 105.

[146] *Id.*

[147] *Id.* The policy contained a provision that prevented any additional rules to be placed with a policy of extended term coverage. *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* Young's complaint sought: (1) $25,000 for the balance of the policy proceeds; (2) $250,000 in general damages; and (3) $5,000,000 in punitive damages against the insurer. *Id.* The suit was filed on May 30, 1989. *Id.*

[151] *Id.* The insurer alleged that all proceeds due under the policy in effect at the time of Young's decedent's death had been distributed to Young and, further, that this

Southern Farm filed for summary judgment, Young responded by alleging that her cause of action did not accrue until Southern Farm Bureau breached its duty when it refused to pay and that she did not intend to release her right to the $25,000 accidental death benefits by signing the proof of loss form in blank.[152] The lower court sustained Southern Farm Bureau's motion for summary judgment on the ground of accord and satisfaction.[153] The Mississippi Supreme Court reversed finding genuine issues of material fact as to the elements of accord and satisfaction.[154] As to the issue of when does an action for the wrongful refusal to pay life insurance benefits accrue, the court stated that "the wrongful refusal to pay life insurance benefits is a breach of the insurance contract."[155] The court noted that recent authority regarding such determinations suggests that an action based upon such a breach accrues at the time of the specific refusal to pay.[156] Thus, the court found that the statute of limitations did not begin to run in this action until Southern Farm Bureau notified Young that it would not pay the accidental death benefits and remanded the matter for proceedings consistent with its opinion.

B. *Fire Insurance*

In *Carter v. Allstate Indemnity Co.*,[157] the court clarified previous holdings and dicta pertaining to the statutory notice requirement by holding that "production of a 'certificate of mailing' is not conclusive proof of the insured's receipt of a cancellation notice; rather the certificate simply constitutes a pre-

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action was instituted more than six years after the death of her husband. *Id.*

[152] *Id.*

[153] *Id.* at 106.

[154] *Id.* The court stated that the elements of accord and satisfaction are to be proven by clear and convincing evidence. Ricks Lumber Co., Inc. v. Natchez Steel & Pipe, Inc., 318 So. 2d 883, 887 (Miss. 1975).

[155] *Young*, 592 So. 2d at 107.

[156] *Id.* (citing Loewer v. New York Life Ins Co., 773 F. Supp. 1518, 1521-22 (M.D. Fla. 1991) ("statute of limitations begins to run on an insurance contract when the insured first receives written notification that a specific claim was denied"); Donovan v. State Farm Fire & Cas. Co., 574 So. 2d 285 (Fla. 2d D.C.A. 1991) (specific refusal to pay claim is breach which triggers cause of action and begins statute of limitations running).

[157] 592 So. 2d 66 (Miss. 1991).

sumption that the insured received the notice."[158] Allstate had mailed Carter a letter containing a 10-day cancellation notice and also secured a "certificate of mailing" as proof that it mailed Carter the notice.[159] After a fire destroyed the property which Allstate had previously insured, Carter filed a claim for the Allstate policy proceeds.[160] Metropolitan National Bank, the named loss payee on the Allstate policy, was added as co-plaintiff and sought damages because Allstate failed to provide it with notice of cancellation as required by law and policy provisions.[161] The court found that Allstate had presented sufficient proof that it mailed a notice of cancellation to Carter.[162] Applying principles of equity, the court found that the bank was precluded from recovering against Allstate notwithstanding Allstate's admitted failure to provide the bank with cancellation as required by law and its own policy provisions. As to the mailing of the cancellation notice by an insurer, the court stated that production of a "certificate of mailing" does not constitute conclusive proof of the insured's actual receipt of the cancellation notice; it merely establishes a presumption that the notice reached the insured's last known address.[163]

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[158] *Carter*, 592 So. 2d at 67.

[159] *Id.* at 68. Carter had obtained the insurance regarding his nightclub, the Possum Hollow Lounge, as partial consideration for a loan made by Metropolitan National Bank, also a co-plaintiff, to Carter for purposes of refurbishing Possum Hollow. *Id.* at 67, 68. The nightclub later burned to the ground on November 23, 1983. *Id.* at 67. Prior to this occurrence, and in addition to the letter of cancellation, Allstate had mailed Carter a refund of unearned premium and, more importantly, Carter had secured another insurance policy on Possum Hollow from Lexington Insurance Company. *Id.* Lexington later paid jointly the full amount of the policy to Carter, his wife, his attorney, and Metropolitan National Bank. *Id.*

[160] *Id.* at 67.

[161] *Id.* at 68. Allstate in fact did not mail a copy of the cancellation notice to the bank which it had mailed Carter. *Id.* at 67. Pursuant to statutory and case law, cancellation of a fire insurance policy shall not become effective until at least ten (now amended to thirty) days after the insurer provides the mortgagee (or trustee) with adequate notice. *Id.* at 71. MISS CODE ANN. § 83-13-9 (Supp. 1990); National Security Fire & Cas. Co. v. Mid-State Homes, Inc., 370 So. 2d 1351, 1352-55 (Miss. 1979). However, the court affirmed the chancellor's findings that Metropolitan National Bank should not recover against Allstate. *Carter*, 592 So. 2d at 73-74. This holding was based upon principles of equity regarding the bank's conduct after it did not apply the proceeds of the Lexington policy to the balance of Carter's loan but instead allowed Carter to enter into new loan agreements with an accompanying release of the Lexington proceeds to Carter. *Id.* at 74-75. Citing Fireman's Fund Insurance Co. v. Appalachian Ins. Co., 572 F. Supp. 799 (E.D. Penn. 1983), the court held that the bank's rights against Allstate were extinguished when the Lexington policy was issued and the bank could have no recover against Allstate. *Carter*, 592 So. 2d at 74.

[162] *Carter*, 592 So. 2d at 69. This included actions performed by Carter suggesting his awareness that the Allstate policy was cancelled, specifically Carter negotiating a refund check of unearned premium and later acquisition of the Lexington policy. *Id.* at 70-71.

C. LENDING INSTITUTIONS AND CREDIT LIFE INSURANCE

In *Hancock Bank v. Travis*,[164] the court examined the issue of a bank's liability regarding the failure to procure credit disability insurance for one of its borrowers.[165] Hancock Bank brought a declaratory judgment action[166] admitting its liability but sought to have the chancery court declare that it was liable only for those mortgage payments which would have been made pursuant to the disability policy that it was offering at the time of the transaction, which limited disability payments to a period of two years.[167] The Travises contended that they relied solely upon Hancock to their detriment and since the bank neglected to obtain the credit disability insurance requested by Mr. Travis, then Hancock was obligated to make all payments on the note for as long as Mr. Travis remained disabled, or for the remainder of the loan, whichever was less.[168] As to the extent of the bank's liability the court cited authority from other jurisdictions in holding that a party who agrees to procure insurance and fails to do so, assumes the position of insurer and thus risk of loss.[169]

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[163] *Carter*, 592 So. 2d at 74. The court further stated that this presumption may be rebutted by the insured who contends that he or she did not actually receive the notice. *Id.* at 75. Furthermore, mere denial of receipt is insufficient to create a triable issue of fact. *Id.*

[164] 580 So. 2d 727 (Miss. 1991).

[165] *Hancock Bank*, 580 So. 2d at 728. Milton Eugene and Willie Mae Travis jointly executed a fifteen year, $40,000 promissory note in favor of Hancock Bank secured by a deed of trust. *Id.* Concurrent with the execution of the deed and the note, Mr. Travis completed a document that was intended to inform the Travises of the costs incurred in obtaining their loan and to determine whether the Travises wished to voluntarily purchase credit life and credit disability insurance. *Id.* Mr. Travis affixed his signature in the space adjacent to the credit life and disability offering thereby requesting that Hancock Bank procure credit life and disability insurance on his behalf. *Id.* However, as a result of an oversight by one of its employees, the bank neglected to mail an application presenting and explaining the policy. *Id.* at 729. Consequently, Hancock Bank failed to request or procure insurance on behalf of Mr. Travis. *Id.* Approximately two years later, Mr. Travis suffered an injury resulting in total disability. *Id.* After the Travises' made demand on the credit disability benefits, Hancock then discovered its error. *Id.*

[166] MISS. R. CIV. P. 57.

[167] *Hancock Bank*, 580 So. 2d at 729. The maximum coverage the bank's insurer would have provided would have been twenty-four monthly payments at $493.01 (amount of monthly note paid by Travises) for a total of $13,157.20. *Id.* The bank offered to credit this amount to the Travis' account in which they owed $38,218.26 on the loan, and asked the court to declare the note and deed were otherwise enforceable. *Id.* Hancock Bank also asked for the right to collect $986.02, representing the monthly mortgage payments owing Hancock at the onset of Mr. Travis' disability, plus late charges.

VI. Evidence

The Mississippi Supreme Court in *Walker v. Graham*[170] provided that the admission or exclusion of evidence, photographs in particular, is within the sound discretion of the trial court, and a decision to admit or exclude such evidence will be upheld unless there is an abuse of discretion.[171] The court in *Walker* in addressing the appellant's contention that morgue photographs should have been allowed in by the trial court, held that the chancellor's decision that the photographs were irrelevant and inflammatory was not an abuse of discretion.[172]

In *Marcum v. Mississippi Valley Gas Co.*,[173] the Mississippi Supreme Court provided that where a party seeks to admit extrinsic evidence to impeach the testimony of a witness, the court may not prevent the admission of such evidence because the adverse party did not previously lay a foundation or otherwise pro-

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Id.

[168] *Id.* at 729.

[169] *Id.* at 731 (citing Richmond v. Grabonski, 781 P.2d 192 (Colo. App. 1989), Heinert v. Home Federal Sav. & Loan Ass'n, 444 N.W.2d 710 (S.D. 1989), Sutton v. First Nat'l Bank of Crossville, 620 S.W.2d 526 (Tenn. App. 1981). However, the court further held that Hancock was entitled to collect the premiums which would have been paid on a policy covering the full term of the loan. *Hancock Bank*, 580 So. 2d at 732. Thus, the court fund that the chancellor had erred in denying the $986.02 plus penalty and interest thereon citing Eastland v. Gregory, 530 So. 2d 172 (Miss. 1908) (party who breaches contract is only liable for damages caused by breach, and non-defaulting party is only entitled to be put in same position as he would have been had there been no breach).

[170] 582 So. 2d 431 (Miss. 1991).

[171] *Walker*, 582 So. 2d at 432.

[172] *Id.*

[173] 587 So. 2d 223 (Miss. 1991).

vide the witnesses the opportunity to respond during cross examination.[174] *Marcum* involved the collision at an intersection between a motorcycle and a truck.[175] Both sides in the trial produced witnesses stating that they proceeded into the intersection when the light was green.[176] In order to impeach the testimony of the appellee's witness, the appellants sought to introduce a police officer's testimony to the effect that the appellee's witness did not see the light at all but had formed her opinion after the appellee told her the light was green.[177] The judge, however, excluded the evidence on the appellee's motion that the officer's testimony was hearsay.[178] The Mississippi Supreme Court reversed, holding that evidence of prior unsworn statements was admissible to impeach the credibility of the witness.[179] Moreover, the court provided that Rule 613(b) of the Mississippi Rules of Evidence did not require the appellant to establish a foundation prior to the court's admission of the evidence, but only required that the impeached party have an opportunity to explain or deny the impeaching statement at some point during the trial.[180]

Additionally in 1991, the Mississippi Supreme Court addressed the issue of whether the state's saving statute could be applied to toll actions brought under FELA in *Prize v. Illinois Central Gulf Railroad Co.*[181] Finding that it could not, the court stated that the FELA's three year statute of limitations could be equitably tolled under appropriate circumstances when the cause is dismissed for procedural reasons, specifically dismissal for improper venue.[182] The court concluded, however, that such equitable tolling was not appropriate in the instant case because it would considerably broaden its interpretation regarding the FELA.[183]

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[174] *Marcum*, 587 So. 2d at 224.

[175] *Id.*

[176] *Id.*

[177] *Id.* at 225.

[178] *Id.*

[179] *Id.* at 227.

[180] *Id.* at 226.

[181] 584 So. 2d 1279 (Miss. 1991).

[182] *Price*, 584 So. 2d at 1281.

[183] *Id.*

MISCELLANEOUS

During 1991, the Mississippi Supreme Court handed down decisions in areas other than those specifically delineated for purposes of this review. Cases involving applications of partnership law,[184] school law,[185] conservatorships,[186] taxation and charitable societies,[187] commodities trading,[188] and elections[189] should be referenced via footnotes. Pursuant to court order, the court also ratified and adopted official rules and comments to the Mississippi Rules of Evidence.[190]

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[184] Smith v. Redd, No. 89-CA-0476 (Miss. Dec. 11, 1991) (where parties entered partnership, exercise control as one with ownership interest, share profits of enterprise, then partnership exists) (*citing* H. REASCHTEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP 250-51 (1979)).

[185] Smith v. Dorsey, No. 7-CA-59273 (Miss. Sept. 4, 1991) (where school board has misappropriated funds by hiring public official, in violation of article IV, section 109, of the Mississippi Constitution, by purchasing activity buses without state approval, by posting performance bond for private corporation, by employing and hosting lunch for campaign workers who prompted passage of board referendum, then members of Board who voted affirmatively for these expenditures are personally liable to state to extent of such expenditures).

[186] Bryan v. Holzer, 509 So. 2d 648 (Miss. 1991) (conservators, as fiduciaries of ward's estate, can be held personally liable for violating fiduciary duty and misappropriating estate funds; law firms representing estates have option of obtaining court assistance when unable to obtain cooperation of conservator in complying with statutory requirements governing conservatorship).

[187] Better Living Services, Inc. v. Bolivar County, 587 So. 2d 914 (Miss. 1991) (nonprofit corporation cannot claim tax exempt status as charitable society unless its property and revenues therefrom are primarily and exclusively used for purpose of charitable institution).

[188] Puckett v. Rufenacht, Bromagen & Hertz, Inc., 587 So. 2d 273 (Miss. 1991) (where customer owns non-discriminatory account, under clear and unambiguous contract, with commodity futures trading broker, broker only has fiduciary duty to faithfully carry out instructions of customer, has no duty to warn or counsel customer who may trade foolishly, and evidence that such brokers customarily warn against foolish trading shall not be admitted to vary terms of agreement or allow customer to escape risk of loss).

[189] Adams County Election v. Sanders, 586 So. 2d 829 (Miss. 1991) (where new elections will be held under new pre-cleared districting plan, and Board of Supervisors has tried to redistrict, then harm to movant requesting injunctive and declaratory relief in response to existing districting plans does not outweigh interest of public in going forward with scheduled elections under state statutory election scheme).

[190] In re: Mississippi Rules of Evidence, No. 89-R-99002 (Miss. March 27, 1991) (Mississippi Supreme Court ratified and adopted amended rules 617, 803, and 804, and official comments to rules 617, 803 and 804 effective March 27, 1991).

BANKING

In *Hancock Bank v. Travis*,[191] Mr. and Mrs. Travis jointly executed a promissory note for a fifteen-year term secured by deed of trust in favor of Hancock Bank.[192] In conjunction with the loan agreement,[193] a Truth-in-Lending disclosure form[194] was presented to the Travises, whereupon Mr. Travis elected to acquire credit life and disability insurance by signing the form in the designated space.[195] Two years later, Mr. Travis had an accident resulting in his total disability.[196] It was not until that time that the bank discovered that one of its employees failed to procure the insurance requested by Mr. Travis.[197] After the bank failed to establish the insurer's contractual liability to the Travises in federal district court,[198] the bank brought suit against the Travises in chancery court, seeking a declaratory judgment.[199] The bank conceded liability,[200] but sought to limit its damages to its normal policy covering twenty-four months of loan installments while holding the Travises accountable for the balance of the loan after a set-off against two late installments past due before Mr. Travis' accident and disability.[201] The chan-

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[191] 580 So. 2d 727 (Miss. 1991).

[192] *Travis*, 580 So. 2d at 728. No representatives from Hancock Bank were present during the closing of the $40,000 loan, which took place at the attorney's office of the Travises. *Id.*

[193] *Id.*

[194] *Id.*; 15 U.S.C.A. § 1601 (West Supp. 1991).

[195] *Travis*, 580 So. 2d at 728-29.

[196] *Id.* at 729.

[197] *Id.* The bank employee did not notice Mr. Travis' signature on the designated portion of the form indicating that he desired the insurance. *Id.* Because of this oversight, the insurance was not procured for the Travises. *Id.*

[198] *Id.*

[199] *Id.* The Travises argued that they were not liable at all to Hancock Bank, and asserted that they had detrimentally relied upon the bank to procure insurance for them. *Id.*

[200] *Travis*, 580 So. 2d at 729.

[201] *Id.* Although not disclosed in any way to the Travises, the bank normally issued policies that provided coverage for 24 months. *Id.* The only reference to the length of the policy was a statement on the "Z" form as follows:

> The insurance premium quoted below is for the term of the loan, unless otherwise indicated.

Id. at 731. The bank contended that because the amount of the premium had not been indicated on the form, there was ample evidence that there was no agreement at all to cery court denied the bank's motion for summary judgment,[202] holding that the bank was obligated to pay the installments for the duration of Mr. Travis' disability or until their fifteen year mortgage was paid in full.[203]

The Mississippi Supreme Court affirmed in part, and reversed in part,[204] holding that while the bank was indeed liable to the Travises on account of its failure to procure insurance,[205] the measure of the bank's liability as determined by the chancellor should have been diminished by an offset for unpaid premiums,[206] overdue mortgage payments,[207] penalties and interest.[208]

In *Great Southern National Bank v. Minter*,[209] an attorney who was designated by court order as conservator of an estate, endorsed checks directed to the conservatorship[210] and thereafter deposited the checks into his personal trust account.[211] Sub-

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procure insurance for the Travises. *Id.*

[202] *Id.* at 729.

[203] *Id.* The chancery court denied the bank's motion for summary judgment, and denied the bank's motion to reconsider summary judgment. *Id.*

[204] *Id.* at 730-33. The court reasoned that the lack of a definite quotation of a premium to be charged in the space provided on the form was irrelevant to the issue of Mr. Travis' belief that the insurance would be procured for the term of the loan, nor did any bank agent indicate that the coverage would be for less than the full 15-year term of the loan. *Id.* at 731.

[205] *Id.* The court dismissed the bank's argument that summary judgment should have been granted according to the court's previous holding in *Parnell v. First Sav. & Loan of Leakesville*, 336 So. 2d 764 (1976), since the bank had already admitted that it was liable to the Travises. *Travis*, 580 So. 2d at 731. Therefore, the court proceeded to address the extent of the bank's liability, and concluded that because the bank had breached an agreement to procure insurance, it had "assume[d] the position of insurer and thus risk of loss." *Id.*

[206] *Travis*, 580 So. 2d at 732-33.

[207] *Id.*

[208] *Id.*

[209] 590 So. 2d 129 (Miss. 1991).

[210] *Minter*, 590 So. 2d at 130-32. The ward Sylvia Slade Lewis had suffered permanent brain damage resulting from a serious automobile accident. *Id.* at 130. Consequently, the ward required "constant care and supervision." *Id.* The attorney, Robert D. Drake, was designated as conservator of the estate, and Sue Lewis Minter was to continue as conservator over the person of the ward. *Id.* As a result of a settlement that followed a lawsuit filed on behalf of the ward, checks representing the proceeds thereof were issued to the conservatorship. *Id.* The checks were made payable to the "Conservatorship of Sylvia Slade Lewis, c/o Robert F. Drake, Esquire." *Id.* at 131.

[211] *Id.* at 130-31. The record showed that the attorney had endorsed two of the checks as an individual and another check both as an individual and by the "Conservatorship of Silvia [sic] Slade Lewis." *Id.*

sequently, the attorney allegedly misappropriated the funds.[212] Noting a loss of funds, Minter, who remained as conservator over the person of the brain-damaged ward, sued the bank in chancery court for allowing such funds to be deposited in the attorney's personal trust account, alleging negligence or other wrongdoing.[213] The bank argued that its negotiation of the checks was in accordance with commercially reasonable standards.[214] Both parties motioned for summary judgment.[215] The chancellor granted Minter's motion for summary judgment[216] and entered a judgment of $52,500 plus prejudgment interest,[217] holding that the endorsements by the attorney-conservator were unauthorized according to the Uniform Commercial Code,[218] and that since the attorney had no authority to endorse the checks in his own name,[219] the bank's acceptance of the checks made the bank liable to Minter for any resulting losses.[220]

The Mississippi Supreme Court reversed and remanded,[221] holding that the attorney, rather than the ward, was the proper payee of the checks,[222] since the checks were payable to the attorney as conservator of the estate, who was duly authorized by the court to receive such funds,[223] even if deposited into his personal account.[224] Reversing the chancellor's decision characterizing the attorney's endorsement of the checks as unauthorized under the Uniform Commercial Code,[225] the court stated that the Mississippi Code specifically authorized such endorsement where the check is made payable to a representative of the estate who is "specified with reasonable certainty,"[226] even if the attorney's actual name had not appeared on the check.[227]

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[212] *Id.* at 130, 133.

[213] *Id.* at 130. Minter alleged that five checks made payable to the "Conservatorship of Sylvia Slade Lewis"— one for $125,000 and four for $17,500—were never received by the conservatorship. *Id.*

[214] *Id.* at 130. The bank answered by presenting the court order which designated Robert D. Drake as the conservator of the ward's estate. *Id.*

[215] *Minter*, 590 So. 2d at 130.

[216] *Id.* at 130-31 & n.2. The proof of the checks as submitted by Minter in support of her motion for summary judgment only included copies of the last three checks and deposit slips, which were used in calculating the judgment against the attorney. *Id.* at 131 & n.2.

[217] *Id.*

[218] *Id.* at 131-32. The court stated that the relevant sections of the Uniform Commercial Code governing negotiable instruments and endorsements as adopted by Mississippi were provided under MISS. CODE ANN. §§ 75-3-101 to -805 (1972). *Minter*, 590 So. 2d at 132. The court stated that the checks fell under "commercial paper" citing MISS. CODE ANN. § 75-3-104 (1972). *Minter*, 590 So. 2d at 132; MISS. CODE ANN. § 75-3-104 (1972). The court cited further MISS. CODE ANN. § 75-3-110 (1)(e) (1972):

> (1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty . . . . It may be payable to the order of . . .
>
> (e) an estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors.

Minter, 590 So. 2d at 132 (emphasis omitted); MISS. CODE ANN. § 75-3-110 (1)(e) (1972).

[219] *Minter*, 590 So. 2d at 131.

[220] *Id.*

[221] *Id.* at 132-36.

The court further held that since the attorney had actual authority as conservator to negotiate the checks,[228] then the bank was not liable when he later misapplied the proceeds,[229] nor was it material whether the bank knew that the attorney was in fact the conservator.[230] The court also held that short of notice or actual knowledge of a breach of trust or misappropriation,[231] the bank as a holder in due course could assume that the attorney-conservator was acting as a proper fiduciary.[232] The court agreed, however, that the bank's motion for summary judgment was properly denied,[233] since it found a lack of evidence regarding the attorney's general conduct which, if explored on remand, might well provide material evidence on the issue whether the bank had sufficient notice of the attorney's misappropriation.[234]

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[222] *Id.* at 131-32.

[223] *Id.* The court further noted that "any endorsement by Ms. Lewis would be wholly without effect." *Id.*

[224] *Minter*, 590 So. 2d at 131-33.

[225] *Id.* at 132-33, 136.

[226] *Id.* at 132.

[227] *Id.* The court reasoned that as conservator, the attorney was within the scope of his duties when he negotiated the checks. *Id.* (citing MISS. CODE ANN. § 75-3-110 (1)(e) (1972)). The court emphasized that whether the bank had actual knowledge of the court order authorizing the attorney as conservator was not controlling since by merely allowing a fiduciary to negotiate a check directed to him in his fiduciary capacity, the bank could not be held liable without evidence of certain additional elements. *Id.* (citing Knox v. Columbia Banking Fed. Sav. & Loan Ass'n, 64 N.Y. 2d 434, 477 N.E. 2d 448, 449, 488 N.Y.S. 2d 146 (1985)). The court observed that while the attorney did not unlawfully negotiate the checks, he did unlawfully misapply the proceeds. *Minter*, 590 So. 2d at 133.

[228] *Minter*, 590 So. 2d at 132-33.

[229] *Id.* at 133.

[230] *Id.* at 133-36.

[231] *Id.* at 134-35.

[232] *Id.* The court explained that a bank need not conduct investigations of fiduciaries in the normal course of business minus any notice of misappropriation. *Id.* at 134.

[233] *Minter*, 590 So. 2d at 135-36.

Allen Grimsley
Kelly Sessoms
John Skousen

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[234] *Id.*

PROPERTY

In 1991 the Mississippi Supreme Court rendered several opinions concerning the law of real property. These decisions involved the particular areas of sixteenth section lands,[1] eminent domain,[2] zoning,[3] partition,[4] land sales,[5] fraudulent conveyance,[6] ad valorem taxes,[7] tax deeds,[8] jurisdiction,[9] priority of liens,[10] tenancies by the entirety,[11] foreclosure,[12] constructive trusts,[13] and adverse possession.[14] Several of these decisions represent significant developments in Mississippi property law and warrant detailed discussion.

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[1] Chevron v. United States, 578 So. 2d 644, 649 (Miss. 1991) (sixteenth section land lease could not exceed twenty-five years); Board of Education v. Hudson, 585 So. 2d 683, 688 (Miss. 1991) (lease of 3.5 acres for 99 years for a one-time fee of $150 was unconscionable).

[2] McDonald's Corp. v. Robinson Indus., 592 So. 2d 927, 934-35 (Miss. 1991) (special court of eminent domain has pendent jurisdiction to try title issues arising from eminent domain proceedings); State Highway Comm'n v. Hyman, 592 So. 2d 952, 955 (Miss. 1991) (failure to file statement of values is technical error which may be waived by trial judge absent showing of possible prejudice).

[3] Columbus & Greenville Rwy. Co. v. Scales, 578 So. 2d 275, 279-80 (Miss. 1991) (railroad is common carrier which enjoys reasonable exemption from local zoning laws); Oak Grove Concerned Citizens v. City of Hattiesburg, 588 So. 2d 814, 823-24 (Miss. 1991) (review of totality of circumstances and will not be overturned absent a showing of manifest error); City of Horn Lake v. Nail Road Joint Venture, 588 So. 2d 839, 840-41 (Miss. 1991) (decision of zoning authority will be upheld absent clear and convincing evidence of arbitrary and capricious ruling); McWaters v. City of Biloxi, 591 So. 2d 824, 827 (Miss. 1991) (decision of zoning board may not be disturbed where underlying issue in dispute is "fairly debatable"); Faircloth v. Lyles, 592 So. 2d 941, 945 (Miss. 1991) (ordinance prohibiting transfer of nonconforming land use is void as arbitrary and capricious).

[4] Stevenson v. Stevenson, 579 So. 2d 550, 553-55 (Miss. 1991) (judicial sale will be voided where erroneous description would deter person of average intelligence from bidding on property due to apprehension of future title litigation).

[5] Vega v. Mullen, 583 So. 2d 1259, 1263-65 (Miss. 1991) (rearticulating factor necessary to overcome presumption of undue influence); Putt v. City of Corinth, 579 So. 2d 534, 537-39 (Miss. 1991) (minutes of town meetings may be sufficient to satisfy statute of frauds requirement of writing agreement for sale of land); Duke v. Whatley, 580 So. 2d 1267, 1273-75 (Miss. 1991) (absence of definite purchase price warrants denial of specific performance remedy on contract for land sale); Hicks v. Bridges, 580 So. 2d 743, 747 (Miss. 1991) (remedy of specific performance on contract for land sale is available where price fixed is below price required by lender to avoid foreclosure); Leach v Tingle, 586 So. 2d 779, 804 (Miss. 1991) (remedy of specific performance is available to party seeking to enforce "buy-back" provision pursuant to contract for sale of land).

[6] Rhoads v. Borden, 584 So. 2d 409, 413 (Miss. 1991) (showing of confidential relationship shifts burden of proof to party denying allegation of fraudulent conveyance).

[7] Harrison Co. Bd. of Supervisors v. Duplantier, 583 So. 2d 1275, 1279 (Miss. 1991) (individual taxpayer may claim only one residence for purposes of taxational homestead

I. EMINENT DOMAIN

In *McDonald's Corporation v. Robinson Industries, Inc.*,[15] the Mississippi Supreme Court held that the Special Court of Eminent Domain has pendent jurisdiction to try title matters arising in the course of eminent domain proceedings.[16] In 1984, the Mississippi State Highway Commission filed a condemnation action in the Special Court of Eminent Domain against property owned by McDonald's Corporation and leased by Robinson Industries.[17] A trial was conducted and the jury awarded total

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exemption).

[8] Brown v. Riley, 580 So. 2d 1234, 1237 (Miss. 1991) (confirmation of tax deed will be denied absent strict compliance with governing statutes).

[9] McIntosh v. Amacker, 592 So. 2d 525, 528 (Miss. 1991) (petition to circuit court for review of actions of county board of supervisors must include bill of exceptions to invoke jurisdiction of court).

[10] In re Bonelli, 584 So. 2d 433, 435-36 (Miss. 1991) (perfection of lien on real property contained in trust must be made by recording).

[11] Newton v. Long, 588 So. 2d 192, 197-98 (Miss. 1991) (tenancy by entirety may be severed by separate deeds when cotenants act in concert with common purpose which does not compromise either party's right of survivorship).

[12] Eastover Bank v. Hall, 587 So. 2d 266, 269-73 (Miss. 1991) (where mortgagor tenders payment to substituted trustee at any time prior to foreclosure sale and trustee fails to reject such payment then any further foreclosure activities are wrongful and render mortgagee liable).

[13] Calcote v. Calcote, 583 So. 2d 197, 199-200 (Miss. 1991) (doctrine of unclean hands is valid defense for party denying existence of trust even where elements of trust are established by clear and convincing evidence).

[14] West v. Brewer, 579 So. 2d 1261, 1264 (Miss. 1991) (chancellor's ruling as to adverse possession where there is conflicting testimony at trial will not be disturbed absent showing of manifest error).

[15] 592 So. 2d 927 (Miss. 1991).

[16] *McDonald's*, 592 So. 2d at 934-35. The court noted that the Special Court of Eminent Domain has subject matter jurisdiction over the action and that there was no authority which required the chancery court to exercise exclusive jurisdiction. *Id.*

[17] *Id.* at 928. Suit was brought separately against McDonald's Corporation and Robinson Industries by the Highway Commission in the First Judicial Circuit of Hinds County. *Id.* The suit brought by the Commission was consolidated on appeal with additional litigation among and between the parties. *Id.*

damages in the amount of $500,000.[18] In 1987, the Highway Commission appealed the award and the matter came before the Mississippi Supreme Court.[19] The Mississippi Supreme Court took notice of plain error and stated that McDonald's had only a revocable permit granting it access to the property in question and that McDonald's and Robinson were therefore compensated for property which they did not own.[20] The court then affirmed a judgment in the amount of $1,000 subject to McDonald's and Robinson entering a remittitur of $499,000.00 and further ordered the matter reversed and remanded if the parties refused to enter the remittitur.[21] McDonald's and Robinson refused to enter the remittitur and petitioned the court for rehearing and further offered evidence of their title to the property which had not been previously submitted.[22] The court refused consideration of this new evidence and denied the petition for rehearing.[23] McDonald's and Robinson then filed an action in chancery court to establish their rights in the property and to enjoin the Highway Commission from proceeding with retrial in the Special Court of Eminent Domain before the title issue was resolved.[24] The Highway Commission responded by filing a motion to dismiss asserting that the prior disposition by the Mississippi Supreme Court barred the action in chancery court.[25] The chancery court dismissed the action as barred by res judicata.[26] The Special Court of Eminent Domain then retried the case and overruled requests by McDonald's and Robinson that questioned the court's jurisdiction over matters pertaining to title and sought transfer to chancery court for resolution of those matters.[27] The trial resulted in damages awarded to McDonald's and Robinson in the amount of $2,100 each; both parties appealed.[28]

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[18] *Id.* A statement of values was submitted by the Highway Commission which estimated total damages for the condemnation to be $219,500.00. *Id.* The jury, however, awarded damages in the amount of $225,000.00 to McDonald's Corporation and $275,000.00 to Robinson Industries. *Id.*

[19] *Id.*

[20] *Id.* (*citing* State Highway Comm'n v. McDonald's Corp., 509 So. 2d 856 (Miss. 1987)). The Mississippi Supreme Court acted pursuant to Supreme Court Rule 6(b) providing for action by the Court upon the discovery of plain error committed in the course of lower court proceedings. *McDonald's*, 592 So. 2d at 928.

[21] *Id.*

[22] *Id.* at 928-29. McDonald's and Robinson offered evidence as to the chain of title which corroborated their ownership of the property. *Id.*

[23] *Id.* at 929. The petition for rehearing was denied without opinion. *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* The chancery court also imposed Rule 11 sanctions against McDonald's and Robinson as requested by the Highway Commission. *Id.*

The Mississippi Supreme Court affirmed in part, reversed and rendered in part, and reversed and remanded in part.[29] The primary focus of the court was the jurisdictional issue concerning the authority of the Special Court of Eminent Domain to try title matters.[30] The court noted that historically, eminent domain proceedings were conducted by a justice of the peace who was severely restricted to the functions expressly dictated by statute.[31] The court, however, noted that changes in the statutory authorization and creation of the Special Courts of Eminent Domain warranted a reevaluation of the jurisdictional scope of these courts.[32] The court pointed out that the weight of authority clearly prohibited an eminent domain court from trying title matters prior to the statutory changes which established the new organization of the eminent domain courts.[33] The court then noted that the circuit courts of Mississippi were empowered to try matters of equity which came before them under pendent jurisdiction, accordingly, the court concluded that the Special

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[27] *Id.* McDonald's and Robinson argued that title dispute was the exclusive province of chancery and that the Special Court of Eminent Domain did not have jurisdiction to try title. *Id.*

[28] *McDonald's*, 592 So. 2d at 929. McDonald's and Robinson appealed all adverse rulings. *Id.* The appeals were consolidated and the primary focus of the Mississippi Supreme Court was upon the jurisdictional issue with the court giving minor treatment to the Rule 11 sanctions and the disputed ruling on attorney's fees. *Id.*

[29] *Id.* at 937. The dismissal by the chancery court was affirmed, the imposition of Rule 11 sanctions was reversed and rendered, and the jurisdictional issue warranted reversal and remand to the Special Court of Eminent Domain. *Id.* The primary focus of the court's attention regarded the jurisdictional issue. *Id.*

[30] *Id.* at 929.

[31] *Id.* The function of the justice of the peace in eminent domain proceedings was largely ministerial and greatly confined to statutory parameters. Sullivan v. Yazoo & Mississippi Valley R.R., 85 Miss. 649, 660, 38 So. 33, 34 (1904).

[32] *McDonald's*, 592 So. 2d at 929. Jurisdiction of the Special Courts of Eminent Domain is now governed by MISS. CODE ANN. § 11-27-3 (1972). *Id.*

[33] *Id.* at 931-32. It was well established that an eminent domain court was restricted to the fixing of an amount of damages which were to be awarded a condemnee. Evans v. Mississippi Power Co., 206 So. 2d 321 (Miss. 1968).

Courts of Eminent Domain should no longer be strictly limited to affixing an amount of damages to be awarded in a condemnation.[34] The Mississippi Supreme Court expressly overruled any of its prior decisions which conflicted with the jurisdiction of the Special Courts of Eminent Domain to try title issues when they arise before it.[35]

II. Jurisdiction

In *McIntosh v. Amacker*,[36] the Mississippi Supreme Court held that a petition for the review of actions of county boards of supervisors must include a bill of exceptions to invoke the appellate jurisdiction of the circuit court.[37] Amacker petitioned the Pearl River County Board of Supervisors for the establishment of a private right-of-way of by necessity.[38] the Board conducted an evidentiary hearing in December, 1987, and granted the right-of-way across the land of McIntosh and assessed minimum damages of $2,000.[39] On February 16, 1988, a notice of appeal was filed by McIntosh with the Board clerk.[40] No statutorily required bill of exceptions was filed with the notice of appeal.[41] On April 14, 1988, Amacker filed a motion with the circuit court requesting that the appeal be dismissed due to the failure of McIntosh to timely provide an appeal bond or notice of appeal.[42] The circuit court denied the motion to dismiss and asserted jurisdiction over both the subject matter and the parties.[43] On May 12, 1988, McIntosh filed a motion requesting that the circuit court consider all suggested errors of law prior to a jury trial concerning the amount of damages.[44] The circuit court denied the motion and further stated that the failure of McIntosh to file a bill of exceptions restricted his appeal to review of the amount of damages.[45] A jury trial was conducted and McIntosh was awarded $387 in damages. McIntosh appealed to the Mississippi Supreme Court.[46]

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[34] *McDonald's*, 592 So. 2d at 934.

[35] *Id.* at 936. Justice McRae filed a dissenting opinion in which he disagreed with the departure from stare decisis and urged that the exclusive jurisdiction to try title should remain with the chancery. *Id.* at 939-40. Justice Hawkins dissented agreeing with the reversal and endorsing Justice McRae's adhesion to stare decisis. *Id.* at 937.

[36] 592 So. 2d 525 (Miss. 1991).

[37] *McIntosh*, 592 So. 2d at 528. The court concluded that the statutory authority allowing an appeal to the circuit court required that a bill of exceptions be filed before the circuit court could exercise jurisdiction. *Id.*

[38] *Id.* at 526.

[39] *Id.*

[40] *Id.*

[41] *Id.* A bill of exceptions is required by the general statute governing appeals to the circuit court. Miss. Code Ann. § 11-51-75 (1972). *Id.*

[42] *McIntosh*, 592 So. 2d at 526.

[43] *Id.*

The Mississippi Supreme Court reversed, vacated and dismissed the appeal.[47] The court noted that while the general statute governing appeals to the circuit court requires the filing of a bill of exceptions to invoke the jurisdiction of the court,[48] the particular statute governing appeals concerning a right-of-way easement mentions no such requirement.[49] The court acknowledged that its prior decisions dictated that a failure to file a bill of exceptions would limit an appellant consideration of factual issues only.[50] The court, however, took occasion to overrule its prior decisions by granting circuit courts jurisdiction even where a bill of exceptions was not timely filed.[51] The court rationalized the departure from precedent as necessary to establish procedural uniformity.[52]

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[44] *Id.*

[45] *Id.* The circuit court noted that Mississippi law required that a bill of exceptions must be filed to preserve any issues of law and the appeal was therefore limited to the factual question of the amount of damages. Evans v. Sharkey Co., 42 So. 173 (Miss. 1906).

[46] *McIntosh*, 592 So. 2d at 526.

[47] *Id.* at 528.

[48] *Id.* at 527. The filing of a bill of exceptions is required to trigger the appellate jurisdiction of the circuit court. MISS. CODE ANN. § 11-51-75 (1972).

[49] *McIntosh*, 592 So. 2d at 527. The statute governing appeals of actions of county boards of supervisors to the circuit court does not articulate any jurisdictional requirement regarding the filing of a bill of particulars. MISS. CODE ANN. § 65-7-67 (1972).

[50] *McIntosh*, 592 So. 2d at 527. Although a bill of exceptions is required to preserve review of any errors of law concerning the actions of county boards of supervisors, the failure to file the bill will not prevent review of factual matters. *Evans*, 42 So. at 173.

[51] *McIntosh*, 592 So. 2d at 527-28. The court noted that numerous decisions since *Evans* dictated that the absence of a bill of exceptions is fatal to an appeal to the circuit court. *McIntosh*, 592 So. 2d at 527.

[52] *McIntosh*, 592 So. 2d at 527. Justice Banks filed a dissenting opinion joined by Justices Dan Lee and Sullivan. *Id.* at 528. The dissent agreed with the objective of uniformity espoused by the majority but disagreed with the abandonment of established precedent in favor of convenience. *Id.* at 528.

III. UNDUE INFLUENCE

In *Vega v. Mullen*,[53] the Mississippi Supreme Court rearticulated the factor necessary to overcome the presumption of undue influence.[54] This suit arose when Miller, an elderly woman, sickly and unable to take care of herself conveyed the property by deed to Mr. and Mrs. Vega setting up a life estate for herself in exchange for their continued care of her and continued maintenance of the property.[55] This arrangement was set up by William (Billy) Andrews III of Purvis, Mississippi, with whom Mrs. Vega had limited prior dealings.[56] Mr. and Mrs. Vega thereafter began driving a tractor trailer for a living but continued to pay for the upkeep and maintenance on the house, leaving the issue of whether the Vegas had reneged on their agreement to care for Mrs. Mullen or whether Mrs. Mullen simply refused the care.[57]

In August 1987, Mrs. Mullen filed a complaint to cancel the deed in question.[58] Among the grounds for her complaint were physical and mental incapacity, undue influence stemming from a fiduciary relationship (between she and the Vegas), fraud by the Vegas to induce her to execute the deed and inadequate consideration.[59] The chancellor found no rebuttal to the provision of undue influence and therefore cancelled the deed pursuant to Mullens' request.[60]

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[53] 583 So. 2d 1259 (Miss. 1991).

[54] *Vega*, 582 So. 2d at 1263-64. The necessary factors include:

(1) good faith on the part of the grantee/beneficiary; (2) grantor's full knowledge and deliberation of his actions and their consequences; and (3) grantor's independent consent and action. The case of Murray v. Laird, 446 So. 2d 575 (Miss. 1984) made the third requirement less rigid allowing for "independent consent and action" to be shown by all of the surrounding facts and circumstances. *Id.* at 1261.

[55] *Id.* The agreement was as follows:

> I, Martha D. Mullen do hereby deed this property to Romeo and Martha Vega. That this is my home that they will take care of me so long as I live. They will pay the bills and upkeep of this property and pay all the bills (light bill, water bills, grocery bills, etc. that I just pay for my doc bills & medicine. Any time they don't want to take care of me this deed is null and void. The children are here and signing this to make sure that this is carried out. (Errors in the original).

Id.

[56] *Id.* at 1261. Upon Mrs. Mullins request, Mrs. Vega took Mrs. Mullins to an attorney easily accessible to her, William (Billy) Andrews III, an attorney in Purvis, Mississippi. Mrs. Vega did not accompany Mrs. Mullins while she spoke to Mr. Andrews about executing the deed. *Id.* at 1261-62.

[57] *Id.* at 1262.

[58] *Id.* at 1263.

The Mississippi Supreme Court first addressed the issue of undue influence.[61] It is settled law in Mississippi that the existence of a fiduciary or confidential relationship gives rise to a presumption of undue influence.[62] As proponents of the deed, the Vegas were required to overcome the presumption by clear and convincing evidence.[63] Analyzing the requirements to overcome the presumption of undue influence, the court stated a more flexible approach from the "independent competent person" to "independent consent and action" which would allow all surrounding facts and circumstances.[64] Such circumstances were the fact that the children of Mrs. Mullen initiated the negotiations for the preparation of the deed.[65] Thus, although Mrs. Vega accompanied Mrs. Mullen to William Andrews III's office, she was left alone with Mr. Andrews to discuss the deed.[66] The court found the surrounding facts and circumstances regarding the execution of the deed clearly indicated a satisfactory rebuttal of undue influence.[67]

The next issue the Mississippi Supreme Court addressed was whether the chancellor was manifestly wrong in setting aside the warranty deed due to lack of consideration.[68] The Vegas proposed that under Mississippi case law, the remedy for failure to support as recited in the deed is a action for damages for breach of the agreement rather than cancellation.[69] The court agreed that "the failure of a grantee to perform a contractual obligation in a deed to support and maintain the grantor does not invalidate a voluntary conveyance, but would give rise to an action for damages caused by the alleged breach of the obligation."[70] The court therefore remanded for further consideration of the issue as well as the proper assessment of damages, if required.[71]

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1263. Miner v. Bertasi, 530 So. 2d 168, 170 (Miss. 1988); Hamm v. Hamm, 146 Miss. 161, 110 So. 583, 584 (1926); Meek v. Perry, 36 Miss. 190, 250 (1858).

[63] *Vega*, 582 So. 2d at 1263.

[64] *Id.* at 1264.

[65] *Id.*

[66] *Id.* at 1264-65. The court gave weight to the testimony of drafting attorney Andrews who indicated in his professional opinion Mrs. Mullen had no decision making impairment. *Id.* at 1262.

[67] *Id.* at 1265.

[68] *Id.*

[69] *Id.* Leggett v. Graham, 218 So. 2d 892, 894-95 (Miss. 1969); Olmstead v. Olmstead, 233 Miss. 621, 103 So. 2d 399, 401-02 (1958).

IV. Sixteenth Section Lands

In *Chevron v. State*,[72] the Mississippi Supreme Court substituted its holding issuing a new opinion on petition for rehearing.[73] Pursuant to this opinion, under a state oil and gas lease of sixteenth section land, the lessee may not continue to work a producing field beyond the twenty-five year limit provided for by section 211 of the Mississippi Constitution.[74]

On February 4, 1957, the Jones County Board of supervisors, along with the county superintendent of education executed an oil and gas lease to W.H. Potts, leasing Section 16, Township 9 North, Range 11 West for oil, gas and mineral development.[75] The lease had a primary term of six years and so long thereafter as oil and gas were produced.[76] The initial consideration was slightly more than $22,500.[77] Potts assigned the lease to the predecessor corporation Chevron U.S.A.[78] Annual delay rentals of $643 were paid to the Jones County Superintendent of Education for the years 1958-1960.[79] In February 1961, the Board of Supervisors certified well 2-1 as oil producing, therefore, eight other wells were drilled, including one dry hole, with a combined production of approximately 1.5 million barrels of oil and 400,000 million cubic feet of gas still producing by the time of trial.[80] On July 30, 1984, Chevron sought to confirm and quiet title in chancery court via Sections 11-17-29 and 23-3-103 of the Mississippi Code naming the State of Mississippi and Jones County Superintendent of Education as defendants.[81] In answering, the defendants counterclaimed and also sought an accounting asserting that due to the 25-year limitation contained in Section 211 of the Mississippi Constitution, the lease was invalid as of February 4, 1982.[82] The chancellor confirmed Chevron's lease to continue operations as to producing wells, while cancelling all rights to undeveloped access and further exploration.[83] Although applying Section 211 to all non-producing wells, the chancellor refused to apply Section 211 to producing areas of the land and instead resorted to equitable considerations to deal with the economic realities peculiar to oil, gas and mineral leases of sixteenth section lands.[84] Chevron appealed the chancellor's cancellation of the lease as to all non-producing areas and horizons.[85] The State cross-appealed contending Section 211 did not authorize the extension of the lease beyond the twenty-five year limitation period.[86]

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[70] *Vega*, 583 So. 2d at 1265.

[71] *Id.* at 1266.

[72] 578 So. 2d 644 (Miss. 1991).

[73] *Chevron*, 578 So. 2d at 645.

[74] *Id.* at 649-50.

[75] *Id.* at 645-46.

[76] *Id.* at 646.

[77] *Id.*

[78] *Chevron*, 578 So. 2d at 646.

[79] *Id.*

The Mississippi Supreme Court strictly interpreted the twenty-five year limitation contained in Section 211 of the Mississippi Constitution and upheld its application to oil and gas leases regardless of any economic burden placed on the lessee.[87] The court, in noting that the Constitution of Mississippi is the supreme law of our state, relied on a similar constitutional construction case, *Hill v. Thompson*.[88] The Mississippi Supreme

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[80] *Id.*

[81] *Id.* MISS. CODE ANN. § 11-17-29 (1972), authorizes suits in chancery court to confirm and quiet title. MISS. CODE ANN. § 29-3-103 (Supp. 1984) authorizes leases to confirm and quiet sixteenth section leases, or extensions thereof, naming as defendant the superintendent of education of the district where the lease is created. Chevron named the State of Mississippi and the Jones County Superintendent of Education as defendants. *Chevron*, 578 So. 2d at 646.

[82] *Chevron*, 578 So. 2d at 646.

[83] *Id.*

[84] *Id.* at 646-47.

[85] *Id.*

[86] *Chevron*, 578 So. 2d at 647.

[87] *Id.* at 649-50.

[88] *Id.* In *Hill v. Thompson*, 564 So. 2d 1 (Miss. 1989), the court interpreted Section 95 of the Mississippi Constitution strictly rendering a lease invalid due to inadequate

Court found such a strict interpretation of Section 211 of the Mississippi Constitution consistent with the underlying judicial role in interpreting the law.[89] Furthermore, the court found that although the chancellor's remedy took into account the practical economic realities regarding Section 211 and attempted to redress these perceived hardships with equity, the court stated that the judiciary's reasonability is to interpret the law and not institute economic policy.[90] The court reasoned that any other interpretation of Section 211 would be the equivalent of a constitutional amendment, a right specifically devoted to the people of the state.[91] As to the hardship that may occur, the court further stated that the duty is upon the legislature to deal with any economic inadequacies that may result from a strict application of Section 211.[92] The court reversed and remanded the chancellor's decision for a determination and accounting consistent with the substituted opinion.[93]

In a vigorous dissent, Justice Robertson called for a more narrow interpretation of Section 211 construing "lands" to mean "simply the soil itself."[94] Robertson noted that the existence of authority allowed for a reasonable interpretation of Section 211's "lands" which would comply with both the constitutional language and present justification for Section 211's existence today.[95] Justice Robertson further argued that the majority's strict interpretation in practice was nonsensical, arbitrary and wasteful following no legal premise.[96] Robertson further argued against the incongruence of the majority's premise in that the state trustee could conceivably convey title to all oil, gas and minerals produced since 1957, yet retain title to all minerals re-

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consideration despite claims such a holding would lead to "harsh or obnoxious consequences." *Chevron*, 578 So. 2d at 649. In the instant case the Section 95 inadequate consideration claim was deemed to be unfounded. *Id.* at 650.

[89] *Chevron*, 578 So. 2d at 649.

[90] *Id.*

[91] *Id.* The court noted Article 15 Section 273 of the Mississippi Constitution provides for the exclusive means for constitutional amendment. *Id.*

[92] *Id.*

[93] *Id.* at 650.

[94] *Id.* at 651 (Robertson, J., dissenting).

[95] *Id.* Pace v. State *ex rel.* Rice, 809, 4 So. 2d 270, 278 (Miss. 1941).

[96] *Chevron*, 578 So. 2d at 656-58 (Robertson, J., dissenting).

maining below the sixteenth section surface.[97]

In *Board of Education v. Hudson*,[98] the Mississippi Supreme Court held that the lease of sixteenth-section lands for inadequate consideration is essentially an illegal donation of land held in public trust and therefore void.[99] This suit stemmed from the January 10, 1952 lease executed by the Lamar County Board of Supervisors to E.S. Myatt of 3.5 acres of sixteenth section land for the one-time lump sum fee of $150.[100] In 1979, John T. Hudson acquired 2.3 of the 3.5 acres. Through other conveyances, Hudson was left with a leasehold of approximately 1.8 acres.[101] In 1986, the Lamar County Board of Education filed suit seeking to void Hudson's leasehold arguing that the original conveyance to Myatt was so low it constituted a donation in violation of Article IV Section 95 of the Mississippi Constitution.[102]

Hudson opposed this claim contending that he was an innocent (bona fide) purchaser (assignee) for value without notice of any alleged defect, and therefore the lease should be deemed valid.[103] The Board countered that Hudson had actual or constructive knowledge of the special trust nature of sixteenth section lands and that a breach of trust occurred when the 3.5 acres was originally leased to Myatt for a grossly inadequate price.[104] The chancellor found for Hudson and confirmed the ninety-nine year lease without resolving whether the $150 sum was adequate consideration.[105] The chancellor ruled in favor of Hudson finding him to be "an innocent (bona fide) purchaser (assignee) for value without notice of any alleged defect in title of the lease."[106]

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[97] *Id.* at 655 (Robertson, J., dissenting).

[98] 585 So. 2d 683 (Miss. 1991).

[99] *Hudson*, 585 So. 2d at 688-89.

[100] *Id.* at 684.

[101] *Id.*

[102] *Id.* at 685. Hudson alleged a lack of awareness notwithstanding an attorney's title search prior to acquiring the leasehold.

[103] *Id.* The Board based this assertion on the state constitution's numerous statues as well as case law.

[104] *Hudson*, 585 So. 2d at 685.

[105] *Id.* The chancellor in finding Hudson an innocent purchaser did not rule on whether the $150 constituted adequate consideration.

[106] *Id.* at 686. MISS. CONST. art. IV, § 95 (1890) provides "lands belonging to, or under the control of the state, shall never be donated directly or indirectly, to private

In its analysis of the claim, the supreme court first addressed whether the Myatt leasehold constituted an unconstitutional donation.[107] For valuation purposes, the court looked to Section 29-3-1 of the Mississippi Code which calls for three disinterested appraisers to aid in the fashioning of a "reasonable amount."[108] The fee paid by Myatt once broken down represented approximately 46 cents per year or one-hundredth of one percent (1/100th of 1%) of the appraisal provided by Hudson's expert.[109] The court found that pursuant to common law the Board acts as trustee who was unauthorized to lease the 3.5 acres for substantially less than market value.[110] This, taken in conjunction with the well-established common law rule governing the regulation and control of sixteenth section lands, led the court to conclude the original Myatt lease amounted to an unconstitutional donation and was, therefore, voidable at the option of the school board.[111] With regard to Hudson's claim of a bona fide purchaser acting in good faith, the court responded in holding that where consideration is so "unconscionably inadequate," such a result overrides any challenges by those claiming bona fide purchaser status.[112] The court also noted that the defect could not have been deemed "hidden" and accordingly charged Hudson with constructive knowledge of the unconstitutionality of the Myatt leasehold.[113] The court reversed judgment of the chancellor declaring the leasehold void.[114]

In a similar fashion, the court summarily discussed the parallel claims of laches and equitable estoppel.[115] The court noted that inadequacy of consideration claims may be challenged in

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corporations or individuals." *Hudson*, 585 So. 2d at 686.

[107] *Hudson*, 585 So. 2d at 686. The procedure for valuation calls for estimated value to be provided by three disinterested appraisers. The County Board of Supervisors is then authorized to lease the land for seventy-five percent (75%) of the estimated value which must be a reasonable amount. *Id.*

[108] *Id.* at 687.

[109] *Id.* at 688. The one-time leasehold fee of 46 cents per acre constituted essentially an illegal donation of land held in the public trust. *Id.*

[110] *Id.*

[111] *Id.* at 687.

[112] *Hudson*, 585 So. 2d at 687-88.

[113] *Id.* at 689.

[114] *Id.* at 688.

[115] *Id.*

sixteenth section cases both before and after the Reform Act of 1978.[116] The court also stated well-settled Mississippi law in refusing to hold the state subject to any statutes of limitations or claims of laches of its officials.[117] The court remanded with restrictions to the Board to obtain the present market value of Hudson's leasehold.[118] Hudson was allowed to remain in possession during the appraisal process and was given the right of first refusal.[119]

In a well-reasoned dissent, Justice Hawkins criticized the majority's holding on several grounds.[120] Justice Hawkins found that because the lessees had followed to the letter the applicable Mississippi statute authorizing the lease of such lands, the lease should have been affirmed.[121] Justice Hawkins emphasized the distinction between agricultural land and "in town" land when analyzing a sixteenth section lease.[122] Justice Hawkins recognized the purpose of an "in town" lease was to encourage local residents to invest and remain in the town as well as to attract new investors.[123] Hawkins further disagreed with the majority's interchangeable use of the terms "void" and "voidable" as well as the granting to Hudson of a "right of first refusal" which was not supported by law.[124]

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[116] *Id.* at 688-89. The court did point out that the state and its political subdivisions "may be equitably estopped under the proper circumstances." *Id.*; *see also* Monroe County Bd. of Educ. v. Rye, 521 So. 2d 900, 908-09 (Miss. 1988); Suggs v. Town of Caledonia, 470 So. 2d 1055 (Miss. 1985).

[117] *Hudson*, 585 So. 2d at 688-89.

[118] *Id.* at 688.

[119] *Id.*

[120] *Id.* at 689-93 (Hawkins, J., dissenting).

[121] *Id.* at 693 (Hawkins, J., dissenting).

[122] *Hudson* 585 So. 2d at 690 (Hawkins, J., dissenting).

[123] *Id.* (Hawkins, J., dissenting).

[124] *Id.* at 691-93 (Hawkins, J., dissenting).

TORTS

In 1991, the Mississippi Supreme Court rendered numerous tort related decisions which discussed and examined Mississippi law regarding the issues of damages,[1] duty of care,[2] foreseeability,[3] circumstantial evidence,[4] professional malpractice,[5] statute of limitations,[6] causation,[7] immunity,[8] and malicious prosecution.[9] The text of the review which follows will discuss only

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[1] Wirtz v. Switzer, 586 So. 2d 775 (Miss. 1991) (where attorney's fees are incurred as result of alleged negligence of third party, such fees may be considered as damages, depending on situation; in order to warrant punitive damages, there must exist in injuries some element of aggression or some coloring of insult, malice, or gross negligence, evincing ruthless disregard for rights of others; where party makes proper demand for interest in pleadings, including date interest was allegedly due, party is entitled to interest from date money was due if amount is liquidated and there is no legitimate dispute that money is owed); Brown v. Cuccia, 576 So. 2d 1265 (Miss. 1991) (where jury verdict in personal injury action is so low as to evince bias, plaintiff's motion for additur or new trial should be granted).

[2] Wirtz v. Switzer, 586 So. 2d 775 (Miss. 1991) (where accountant/client relationship exists, accountant is liable for losses suffered by reasonably foreseeable users of information supplied by accountant, if losses were proximately caused by accountant's negligence); Freels v. Sonford Prods. Corp., 587 So. 2d 262 (Miss. 1991) (supplier of hazardous materials has affirmative duty to warn buyers in manner adequate to inform of dangerous nature of materials); Bass v. California Life Ins. Co., 581 So. 2d 1087 (Miss. 1991) (where group health insurance policy administrator's conduct constitutes gross negligence, malice, or reckless disregard for rights of insured, administrator may incur independent liability for bad faith); Burton v. City of Philadelphia, No. 90-CA-0285 (Miss. Sept. 4, 1991) (municipality is required to exercise ordinary care to maintain streets and sidewalks in reasonably safe condition for use of persons exercising ordinary care and caution); Hosford v. McKissack, 589 So. 2d 108 (Miss. 1991) (provider of expert or specialized services to public owes duty of reasonable care, without regard to privity, to reasonably foreseeable users of expert's information who detrimentally rely on such information and suffer damages); Strickland v. Rossini, 589 So. 2d 1268 (Miss. 1991) (rule that foreseeable recipients of negligently prepared professional opinion who detrimentally rely on opinion in their business affairs may recover from professional offering opinion, also applies to indemnity claims; where injury is reasonably foreseeable by defendant, plaintiff may recover for emotional injury proximately resulting from defendant's negligent conduct); Martin v. Midsouth Rail Corp., 584 So. 2d 1282 (Miss. 1991) (servants of railroad company in charge of its train are under no duty to keep lookout for trespassers on railroad track and are required only to exercise reasonable care to prevent injuring trespasser after they have discovered and realized his peril); Kussman v. V & G Welding Supply, Inc., 585 So. 2d 700 (Miss. 1991) (independent contractor who negligently makes or repairs chattel for another is subject to same liability as that imposed upon negligent manufacturer of chattels); Lyle v. Mladinich, 584 So. 2d 397 (Miss. 1991) (business owner has duty to exercise reasonable care to protect invitee from reasonably foreseeable injury at hands of other patrons); May v. V.F.W. Post No. 2539, 577 So. 2d 372 (Miss. 1991) (same); O'Cain v. Harvey Freeman & Sons, Inc., No. 07-CA-59446 (Miss. Dec. 18, 1991) (landlord is liable for latent defects where landlord either knows

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about defect and conceals it, or is aware of defect and fails to inform tenant about it).

[3] Lyle v. Mladinich, 584 So. 2d 397 (Miss. 1991) (in considering foreseeability of assault on invitee by other patron, business owner's cause to anticipate assault may arise from actual or constructive knowledge of either (1) assailant's violent nature, or (2) existence of atmosphere of violence in business establishment or its attendant parking lot); May v. V.F.W. Post No. 2539, 577 So. 2d 372 (Miss. 1991) (same).

[4] Kussman v. V & G Welding Supply, Inc., 585 So. 2d 700 (Miss. 1991) (negligence may be proved by circumstantial evidence where circumstances are such as to remove case from realm of conjecture and place case within field of legitimate inference).

[5] Wirtz v. Switzer, 586 So. 2d 775 (Miss. 1991) (factors which must be proven by preponderance of evidence in accountant malpractice case are those factors applicable to attorney malpractice case); Triplett v. State, 579 So. 2d 555 (Miss. 1991) (where attorney has contracted to pursue appeal, attorney must do so, unless grounds for withdrawal or termination exist and attorney gets court's permission to withdraw; in context of attorney's obligation to inform criminal defendant he may appeal *in forma pauperis*, no relevant distinction exists between court-appointed counsel and retained counsel); Singleton v. Stegall, 580 So. 2d 1242 (Miss. 1991) (duties lawyer owes client fall into three broad categories of (1) duty of care (2) duty of loyalty, and (3) duties provided by contract); Hudson v. Parvin, 582 So. 2d 403 (Miss. 1991) (medical malpractice action may be brought in contract or in tort; in context of informed consent, physician must disclose known risks which would be material to prudent patient in determining whether to undergo suggested treatment).

[6] Lowery v. Statewide Healthcare Serv. Inc., 585 So. 2d 778 (Miss. 1991) (where suit against agent is barred by statute of limitation, same claim is likewise barred as against principal whose liability is based solely upon principal/agency relationship); Martin v. Reikes, 587 So. 2d 285 (Miss. 1991) (where, upon reversal of case by supreme court, unsuccessful appellee fails to pay court costs because law in place at relevant time failed to afford appellee fair notice that two-year statute of limitation had begun to run, such statute may be tolled and may not bar appellee's right to retrial); Hudson v. Parvin, 582 So. 2d 403 (Miss. 1991) (where amended pleadings relate back to original complaint, claim will not be barred by statute of limitations).

[7] Hudson v. Parvin, 582 So. 2d 403 (Miss. 1991) (in determining existence of causal connection between breach of duty and resulting injury in informed consent case, test is whether reasonably prudent patient, fully advised of material known risks, would have consented to suggested treatment); O'Cain v. Harvey Freeman & Sons, Inc., No. 07-CA-59446 (Miss. Dec. 18, 1991) (where intervening criminal act is not within realm of reasonable foreseeability, such criminal act may be intervening cause which breaks causal connection with defendant's negligent act).

[8] McQueen v. Williams, 587 So. 2d 918 (Miss. 1991) (where public official's duties are discretionary in nature and public official does not substantially exceed his authority or commit intentional tort, official is protected by qualified immunity); Starnes v. Vardaman, 580 So. 2d 733 (Miss. 1991) (same; since municipal function of garbage collection is proprietary function and not governmental function, municipality enjoys no immunity to suit from actions arising from performance of such function).

[9] Strong v. Nicholson, 580 So. 2d 1288 (Miss. 1991) (in malicious prosecution suit,

those 1991 decisions that expanded or modified Mississippi Law.

I. Duty of Care

In *Bass v. California Life Insurance Co.*,[10] the Mississippi Supreme Court considered the bad faith liability of a group health insurance policy administrator.[11] California Life Insurance Company [hereinafter California Life] was the group insurance carrier for the City of Tupelo,[12] and California Life used Variable Protection Administrators, Inc. [hereinafter VPA] as an administrative organization to handle the management of the City's insurance.[13] Donna Bass, an employee of the City of Tupelo, filed several insurance claims via VPA for doctor visits concerning problems with her feet.[14] The first of these claims was paid, while the other claims were denied.[15] In defending against Bass' suit for bad faith denial of her insurance claims, VPA argued that since VPA was not a party to the insurance contract it could not be held liable for bad faith,[16] according to the case of *Griffin v. Ware*.[17]

The court overruled *Griffin*,[18] following instead the case of

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plaintiff must show (1) institution of criminal proceeding, (2) by or at instance of defendant, (3) termination of such proceeding in plaintiff's favor, (4) malice in instituting proceeding, (5) want of probable cause for proceeding, and (6) plaintiff's suffering of injury or damage as result of prosecution; malice in law of malicious prosecution connotes prosecution instituted for purpose other than bringing offender to justice).

[10] 581 So. 2d 1087 (Miss. 1991).

[11] *Bass*, 581 So. 2d at 1089.

[12] *Id.* at 1088. California Life replaced Dependable Life Insurance Company as the group insurance carrier for the city of Tupelo in February of 1985. *Id.* The policy enacted by California Life provided continuous coverage for city employees without changing their effective dates. *Id.*

[13] *Id.*

[14] *Id.* Bass enrolled in the City's group health insurance plan in May of 1984. *Id.* Her first doctor visit was in September of 1984, prior to California Life becoming the City's insurance carrier. *Id.*

[15] *Id.* VPA denied all but the first claim on the basis of the later claims being for a "pre-existing condition" under the terms of the insurance policy with California Life. *Id.*

[16] *Id.* at 1089.

[17] 457 So. 2d 936 (Miss. 1984). The court in *Griffin* held that "adjusters employed by an insurer, who were not parties to the agreement for insurance, are not subject to an implied duty of good faith and fair dealing to the insured." *Griffin*, 457 So. 2d at 940. In the instant case, the Mississippi Supreme Court noted that the trial court had relied on *Griffin* in granting a directed verdict in favor of VPA. *Bass*, 581 So. 2d at 1090.

[18] *Bass*, 581 So. 2d at 1090. The Mississippi Supreme Court stated that the ruling in

Dunn v. State Farm Fire & Casualty Co.,[19] and held that an administrative agent such as VPA may be held liable for bad faith when the agent's "conduct constitutes gross negligence, malice, or reckless disregard for the rights of the insured."[20]

In *Hosford v. McKissack*,[21] the Mississippi Supreme Court considered the issue of whether a termite inspector owes a duty to a subsequent third party home purchaser who detrimentally relies on the information contained in the inspector's report where the third party is a reasonably foreseeable user of that information.[22] In answering this question in the affirmative, the court noted that by statute,[23] privity was not a requirement in an action for negligence, and thus it was of no consequence that the subsequent home purchasers, the Hosfords, had no contract with the termite inspector and the home seller.[24] The court compared the termite inspector to an independent auditor who is liable to reasonably foreseeable users of an audit where those users request the information from the audited entity and then detrimentally rely on that information.[25] However, the court went a step further. Citing the language of the Restatement,[26] the court determined that in order for a third party to recover, it

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Griffin was "insufficient for the day. Jurisprudence should not be in the position of approving a deliberate wrong." *Id.*

[19] 711 F. Supp. 1359 (N.D. Miss. 1987).

[20] *Bass*, 581 So. 2d at 1090 (quoting *Dunn*, 711 F. Supp. at 1361). The court revealed that it was not holding adjusters or agents to a standard of ordinary negligence. *Id.* The court noted that the punitive damages evidence was inconclusive and, having established the applicable standard of care, reversed and remanded the case for further proceedings. *Id.*

[21] 589 So. 2d 108 (Miss. 1991).

[22] *Hosford*, 589 So. 2d at 108-12. In this case, the owner of the home who ordered the termite inspection and report was Johnny McCrary of McCrary Real Estate, Inc. *Id.* at 109. McCrary ordered the inspection prior to his buying the home. *Id.* He subsequently bought the home and took title in his own name. *Id.* The third party purchasers were the Hosfords, who did not engage the termite inspector and whose names did not appear on the report submitted to McCrary. *Id.* The report, dated June 4, 1986, stated that there was no damage and no evidence of infestation from wood destroying insects. *Id.* The report was submitted to the Hosfords at the closing of the purchase on July 11, 1986. *Id.* In January of 1988, substantial termite infestation and damage were found. *Id.*

[23] MISS. CODE ANN. § 11-7-20 (Supp. 1986).

[24] *Hosford*, 589 So. 2d at 110.

[25] *Id.* at 110-11 (citing *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315, 322 (Miss. 1987)).

[26] RESTATEMENT (SECOND) OF TORTS § 552 (1977).

is not necessary that the third party have formally requested the inspection information from the maker, but only that the third person be one to whom the inspector knows or reasonably should know the original recipient intends to supply the information.[27]

The Mississippi Supreme Court established the duty of an independent contractor who repairs a chattel for another, in *Kussman v. V & G Welding Supply, Inc.*[28] The plaintiff, Larry Kussman, was injured when he fell from a roof after being severely shocked by a power tool that had been repaired by V & G.[29] The Mississippi Supreme Court first revealed that Mississippi law regarding defective conditions of a product leaving a seller or manufacturer follows the Restatment[30] view.[31] The court then recognized that the Restatement[32] also provided that "an independent contractor [who] rebuilds or repairs a chattel for another is subject to the same liability as that imposed upon negligent manufacturers of chattels."[33] In explaining the scope of an independent contractor's duty the court followed the comments found in the Restatement,[34] which basically provide that the contractor's negligence need not have changed the condition of the chattel for the worse, but instead it is enough that because of the contractor's negligence the chattel is not in as safe a condition as a competent contractor would have put it[35] and that the chattel is used in reliance upon the care and competence of the contractor.[36]

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[27] *Hosford*, 589 So. 2d at 111. The court noted that McCrary bought and sold houses professionally, and the termite inspector should reasonably have foreseen that McCrary's immediate purchaser would receive and rely on the report. *Id.* The court determined that the circuit court's grant of summary judgment was improper in that lack of privity was not a defense and there existed genuine issues of material fact regarding foreseeability and detrimental reliance. *Id.* at 112. Accordingly, the circuit court's ruling in favor of the termite inspector was reversed and the case remanded. *Id.*

[28] 585 So. 2d 700 (Miss. 1991).

[29] *Kussman*, 585 So. 2d at 700-01. The tool in question was originally repaired by Philip Jones, an employee of V & G. *Id.* at 701. Jones installed a new switch cover and tested the tool for short circuits. *Id.* No short circuits were indicated and someone from Kussman's place of employment picked up the tool. *Id.* The tool was returned to V & G some nine days later but no one knew why, and no one knew what happened between the time the tool was originally brought to V & G and the time it was returned to V & G. *Id.* Again, someone from Kussman's place of employment picked up the tool, and four days later Kussman was injured. *Id.* Because of this lack of evidence as to what exactly happened to the tool prior to Kussman's injury, the trial court granted V & G's motion for a directed verdict. *Id.* at 702.

[30] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[31] *Kussman*, 585 So. 2d at 703-04 (citing *Ford Motor Co. v. Matthews*, 291 So. 2d 169, 172 (Miss. 1974)).

[32] RESTATEMENT (SECOND) OF TORTS § 404 (1964).

[33] *Kussman*, 585 So. 2d at 704 (citing RESTATEMENT (SECOND) OF TORTS § 404 (1964)).

In *May v. V.F.W. Post No. 2539*,[37] the Mississippi Supreme Court considered the duty of the V.F.W., as a business premises owner, to safeguard patrons from injury at the hands of other patrons.[38] David May was injured in an altercation with a V.F.W. off-duty employee who, like May, was in attendance at a benefit dance on the V.F.W. premises.[39] The court first cited established Mississippi law, stating that a premises owner's duty to safeguard patrons was limited to the exercise of reasonable care to protect patrons from reasonably foreseeable injury at the hands of other patrons.[40] The court then added that one criterion to be considered in determining the liability of a premises owner for the wrongful act of a third person is the spontaneity of the act in question.[41]

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[34] RESTATEMENT (SECOND) OF TORTS §§ 403 comment b, 404 comment b (1964).

[35] *Kussman*, 585 So. 2d at 704. The court quoted the comments which state that the rule applies even where the condition of the chattel is in fact improved by the work performed by the contractor. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 403 comment b (1964)).

[36] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS §§ 403 comment b, 404 comment b (1964)). The court noted that a chattel which is returned to the owner before it is adequately repaired has a "deceptive appearance of safety." *Id.* (citing *Anderson v. Glynn Const. Co.*, 421 N.W.2d 141, 145 (Iowa 1988)). The court determined that a reasonable juror could have concluded that it was more probable than not that the repairman was negligent, and the court reversed and remanded the case for further proceedings. *Id.* at 705.

[37] 577 So. 2d 372 (Miss. 1991)

[38] *May*, 577 So. 2d at 375-77.

[39] *Id.* at 373. The Mississippi Supreme Court addressed the issue of the V.F.W's liability due to a V.F.W. employee being involved in the altercation. The court determined that even if the employee had been present at the dance to perform his duties of employment, the V.F.W. would not be liable because the altercation was in no way in furtherance of the V.F.W.'s business. *Id.* at 377.

[40] *Id.* at 376 (citing *Grisham v. John Q. Long V.F.W. Post No. 4057*, 519 So. 2d 413, 419 (Miss. 1988)). The court explained that an owner may be liable for the acts of a third person only when the owner has cause to anticipate the wrongful or negligent act, with the requisite cause to anticipate arising "from 1) actual or constructive knowledge of the assailant's violent nature, or 2) actual or constructive knowledge that an atmosphere of violence exists [on or about the premises.]" *Id.* (citing *Grisham*, 519 So. 2d at 416-17) (alteration in original)). The court noted that the record did not demonstrate that the V.F.W. could have known of the employee's impending actions, nor did the record

II. PROFESSIONAL MALPRACTICE

The Mississippi Supreme Court established the factors that must be proven by a preponderance of the evidence in an accountant malpractice case, in *Wirtz v. Switzer*.[42] The beneficiaries under a will brought suit against an accounting firm and one of its accountants, alleging negligent performance of professional accounting services for the estate.[43] The court first described the accountant's duty of care as being basically one of reasonable care employing the knowledge, skill, and judgment possessed by other accountants in the area.[44] The court then determined that those factors which must be proven in an attorney malpractice case are equally applicable to an accountant malpractice case.[45] The court explained the factors as being 1) the existence of an accountant-client relationship, 2) negligence on the part of the accountant handling his client's affairs entrusted to him, and 3) proximate cause of injury.[46]

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demonstrate that the V.F.W. was a bar room brawl type of establishment. *Id.*

[41] *Id.* at 376-77. The court concluded that because of the spontaneity of the altercation, it was inconceivable that the VFW reasonably could have protected May from the attack. *Id.* at 377. Accordingly, the court affirmed the trial court's grant of summary judgment in favor of the V.F.W. *Id.* at 378.

[42] 586 So. 2d 775 (Miss. 1991).

[43] *Wirtz*, 586 So. 2d at 777. Specifically, the beneficiaries under the will alleged that the accountant failed to file timely a fiduciary return for the estate and that he ommitted the 1982 windfall profit taxes on a schedule prepared for use by the estate. *Id.* The trial court granted the defendants' motion for a directed verdict on the issues of punitive damages and negligent preparation of the schedule. *Id.* The trial proceeded on the negligent filing claim, and the trial court subsequently granted a directed verdict in favor of the beneficiaries on that issue but denied their request for prejudgment interest. *Id.* at 777-78.

[44] *Id.* at 779 (quoting 1 AM. JUR. 2d *Accountants* § 15 (1962)).

[45] *Id.*

[46] *Id.* (citing *Hickox by and through Hickox v. Holleman*, 502 So. 2d 626, 633 (Miss. 1987)). The court noted that proof as to whether the accountant did exercise the appropriate level of knowledge, skill, or ability must come from expert testimony. *Id.* at 781. The Mississippi Supreme Court pointed out that there was expert testimony introduced at trial which, if believed, would have established that the accountant was negligent in ommitting the 1982 windfall profit taxes. *Id.* The court affirmed in part and reversed and

In *Triplett v. State*,[47] the Mississippi Supreme Court announced[48] that in the context of a lawyer's obligation to inform a criminal defendant that he may appeal *in forma pauperis*,[49] there is no relevant distinction between court-appointed counsel and retained counsel.[50] The court welcomed the opportunity to reject and overrule the portion of *Bennett v. State*[51] which held that no constitutional obligation existed to inform a convicted defendant represented by retained counsel at his trial that he may appeal *in forma pauperis*.[52]

III. STATUTES OF LIMITATION

In *Lowery v. Statewide Healthcare Service, Inc.*,[53] the Mississippi Supreme Court considered a medical malpractice action against a nurse and the nurse's employer arising out of the death of a hospital patient who had been treated by the nurse.[54] The

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remanded for a new trial on the issue of negligent preparation of the tax schedule. *Id.* at 786.

[47] 579 So. 2d 555 (Miss. 1991).

[48] *Triplett*, 579 So. 2d at 556. The court was considering the out-of-time appeal of criminal defendant Michael Triplett. *Id.* Triplett's parents retained attorney B to represent him in the criminal trial, and the contractual arrangement "most likely included an appeal." *Id.* Triplett was convicted of manslaughter and requested an appeal; however, attorney B did not attempt to perfect an appeal, claiming he had not been paid in accordance with the fee arrangement. *Id.* at 556-57. The trial court denied Triplett's motion for an out-of-time appeal. *Id.* at 557. The Mississippi Supreme Court, applying existing law, held that it was incumbent upon attorney B to pursue an appeal, having contracted to do so. *Id.* at 558. The court noted that if grounds for withdrawal or termination existed, attorney B should have sought the court's permission to withdraw from representation. *Id.*

[49] *Id.* at 558. Triplett asserted that attorney B never advised him that if he became indigent and could not pay the necessary costs of his defense, he could file a pauper's affidavit and proceed with the appeal *in forma pauperis*. *Id.*

[50] *Id.* at 559.

[51] 293 So. 2d 1 (Miss. 1974).

[52] *Triplett*, at 559. The court stated, "we welcome the opportunity to reject a former pronouncement which, like the dinosaur, has become extinct." *Id.* The court recognized that the fact that counsel has been privately retained should not serve to excuse ineffectiveness of counsel. *Id.* The court reversed the order of the trial court denying the motion for an out-of-time appeal and directed the trial court to permit the appeal. *Id.*

[53] 585 So. 2d 778 (Miss. 1991).

[54] *Lowery*, 585 So. 2d at 778-79. The patient died on October 30, 1980, while allegedly under the nurse's care. *Id.* at 779. The nurse and the nurse's employer were joined as party defendants on May 5, 1986, and the plaintiffs alleged that the nurse's employer had contracted with the Mississippi Baptist Medical Center to furnish nursing personnel

court concluded that the suit against the nurse was time barred by the two-year statute of limitation,[55] because that statute specifically named nurses.[56] In addition, the court explained that where a claim is barred by a statute of limitation against an agent, that same claim is barred as against the principal whose liability is based solely on the principal/agency relationship.[57] Thus, the court held that the suit against the nurse's employer under the doctrine of respondeat superior was not governed by the catch-all six-year statute of limitation,[58] but was instead time barred by the two-year statute of limitation applicable to the claim against the nurse.[59]

The majority's decision did not, however, go uncriticized. Justice Sullivan, concurring in part and dissenting in part, observed that the employer could not claim the protection of section 15-1-36 which benefitted its agent, because the plaintiffs asserted a claim against the employer that was not based on respondeat superior.[60]

Justice McRae, concurring in part and dissenting in part, emphasized that the majority was misapplying section 15-1-49 and the doctrine of respondeat superior, and that the plaintiffs'

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to the medical center's hospital and that the nurse was negligent in treating the patient. *Id.* The circuit court dismissed the suit against both the nurse and the nurse's employer as being time barred by the two-year statute of limitation of Miss. Code Ann. § 15-1-36 (Supp. 1986). *Id.* at 778.

[55] Miss. Code Ann. § 15-1-36 (Supp. 1986).

[56] *Lowery*, 585 So. 2d at 779. The statute, as it pertained to this suit, basically provided that no claim in tort could be brought against a licensed nurse for injuries from medical treatment unless filed within two years. *Id.* Although the statute was amended after the suit was filed, the Mississippi Supreme Court noted that the language of § 15-1-36, as it applied to this case, was not affected by the amendments. *Id.* at 779 n.1.

[57] *Id.* at 780. The court cited 54 C.J.S. *Limitations of Actions* § 15 (1948) and 3 Am. Jur. 2d *Agency* § 348 (1962) as supporting this general rule. *Lowery*, 585 So. 2d at 780.

[58] *Lowery*, at 779. The court was referring to § 15-1-49 of the Mississippi Code which provided that "all actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after." Miss. Code Ann. § 15-1-49 (1972).

[59] *Lowery*, 585 So. 2d at 780. Accordingly, the court affirmed the trial court's dismissal of the suit as time barred. *Id.*

[60] *Id.* at 780-81 (Sullivan, J., concurring in part and dissenting in part). Justice Sullivan also noted that the employer was not entitled to benefit from the two-year statute because the employer was not a class specifically listed in the statute and Mississippi follows the rule that "a statute should not be applied to classes not clearly within its provisions." *Id.* at 781.

suit against the employer was governed by the six-year statute of limitation.[61]

Bobby N. Turnage, Jr.

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[61] *Id.* at 782 (McRae, J., concurring in part and dissenting in part). Justice McRae stated that negligence and liability for negligence are not the same thing, and the doctrine of respondeat superior imputes to an employer the negligence, not the liability, of an employee. *Id.* at 783.

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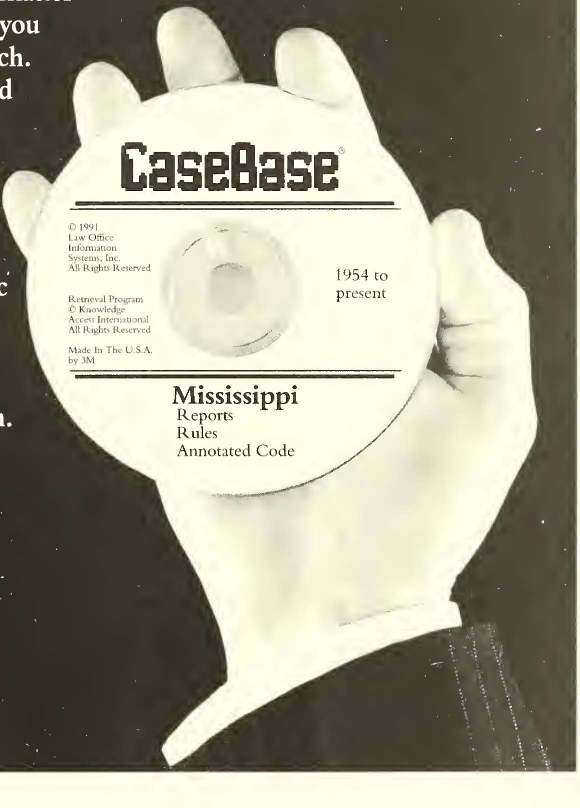
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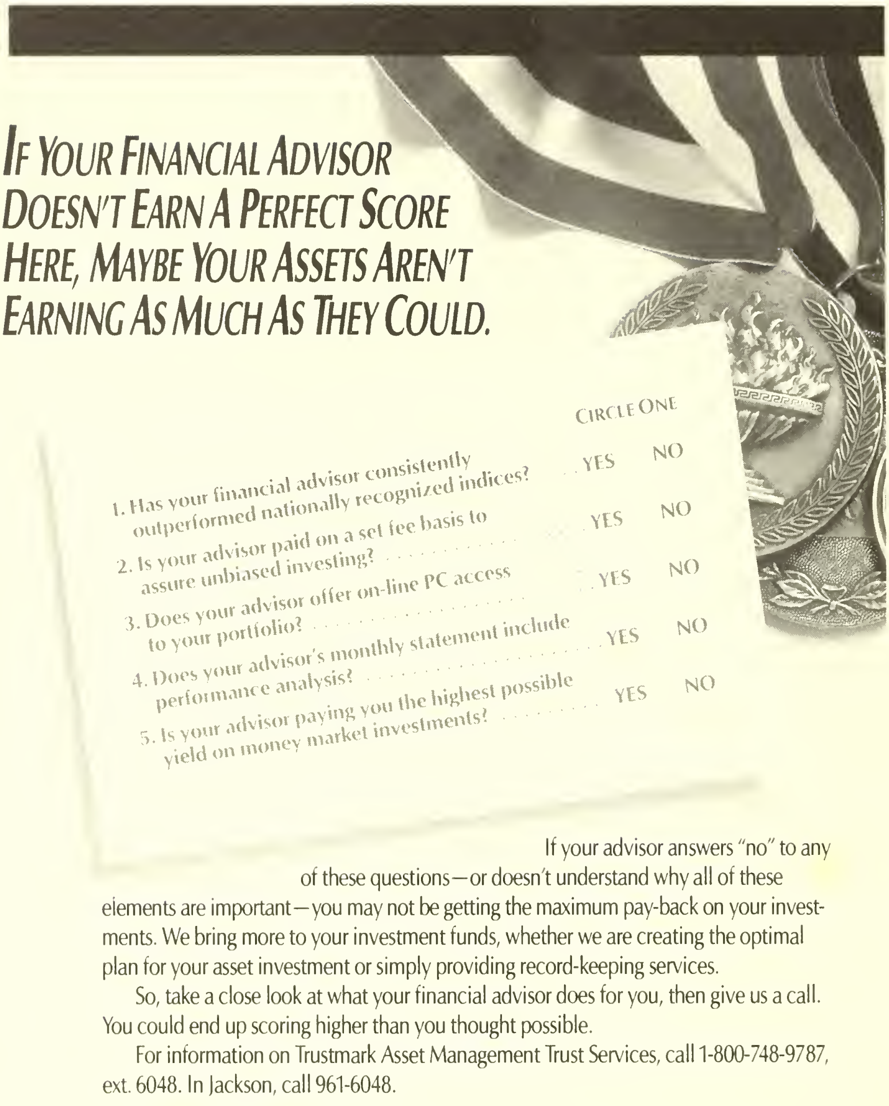

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